TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 161

NATIONAL METROPOLITAN BANK, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JUNE 14, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Case No. 8562

Appendix to Appellant's Brief

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 16,716

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE NATIONAL METROPOLITAN BANK, a Corporation, 613 15th Street, N. W., Washington, D. C., Defendant

COMPLAINT FOR RECOVERY OF MONEY PAID ON FORGED ENDORSEMENTS—Filed August 11, 1942

First Count

Paragraph 1. The plaintiff, the United States of America, a corporation sovereign, by its attorney, Edward M. Curran, United States Attorney for the District of Columbia, brings this proceeding against the National Metropolitan Bank of Washington, D. C., a corporation engaged in the business of banking in the District of Columbia, and states that defendant owes the plaintiff the sum of Eighteen Thousand, Sixty Dollars and Eighty-three Cents ($18,060.83), paid by the plaintiff to the defendant under a mistake of fact, on the dates and under the circumstances hereinafter mentioned.

Paragraph 2. Certain checks, photostatic copies of which are annexed hereto and marked Exhibits A-1 to A-144 inclusive, were drawn on the Treasurer of the United States by officers or agents of the United States duly authorized to draw such checks. Each of said checks was issued and [fol. 2] thereafter was endorsed with a signature purporting to be the true and genuine signature of the payee

thereof, but said signature was in fact, false, forged and counterfeit.

Paragraph 3. Each check, after said false, forged and counterfeit endorsement had been placed thereon, was endorsed by the defendant and presented by defendant for payment to the Treasurer of the United States at Washington, D. C., which said Treasurer, believing said false, forged and counterfeit endorsement to be the true and genuine signature of the payee named on the face of the check, paid to the defendant the amount thereof. Each of the said checks, so endorsed and so paid, is listed in Exhibit B annexed hereto and incorporated herein according to number, amount and date of payment.

Wherefore, the plaintiff demands judgment against the defendant for the amounts so paid by the plaintiff to the defendant on the said checks, in the total amount of Eighteen Thousand, Sixty Dollars and Eighty-three Cents, ($18,060.83) together with interest on the amounts paid on the said checks at the rate of 6% per annum from date of each payment, as more specifically set out in Exhibit B, besides costs of this suit.

Second Count

Paragraph 1. And for further complaint, the said plaintiff, the United States of America adopts by reference, and herein incorporates, the averments of Paragraph 2 of the First Count of this action, and states that each check, after said false, forged and counterfeit endorsement had been placed thereon, was endorsed by the defendant, the National Metropolitan Bank of Washington, D. C., a corporation engaged in the business of banking in the District of Columbia in the manner and form set out in Exhibits A-1 to A-144 inclusive, and that the defendant did thereby guarantee the genuineness of the prior endorsements upon the said checks, including the endorsements of the payees named on the face [fol. 3] of the said checks; that the said guaranties were made as part of the said endorsements in order to induce the plaintiff to pay the amounts of the said checks to the defendant; that the defendant presented the said checks for payment to the said Treasurer of the United States at Washington, D. C. which said Treasurer, relying upon the guaranty of the defendant as to the validity of the endorsements upon the said checks, and solely because thereof, paid

to the defendant the amounts of the said checks on the dates set out in Exhibit B annexed hereto.

Wherefore, the plaintiff demands judgment against the defendant for the amounts so paid by the plaintiff to the defendant on the said checks, in the total amount of Eighteen Thousand, Sixty Dollars and Eighty-three Cents ($18,060.83), together with interest on the amounts paid on the said checks at the rate of 6% per annum from the date of each payment, besides costs of this case.

Edward M. Curran, United States Attorney; Grace B. Stiles, Assistant United States Attorney, Attorneys for Plaintiff.

EXHIBIT "B" TO COMPLAINT

Exhibit No.	Check No.	Payee	Amount	Date of Payment
A-1	9,975	C. B. Cates	$172.60	Jul. 14, 1936
A-2	10,630	C. R. Wallace	96.00	Jul. 27, 1936
A-3	11,255	H. M. Peter	96.00	Aug. 7, 1936
A-4	11,264	C. R. Wallace	131.84	Aug. 11, 1936.
A-5	11,375	H. M. Peter	147.50	Aug. 18, 1936
A-6	12,373	C. B. Cates	88.16	Sept. 12, 1936
A-7	12,485	C. R. Wallace	147.50	Sept. 18, 1936
A-8	12,977	C. R. Wallace	131.84	Oct. 8, 1936
A-9	13,467	C. R. Wallace	96.00	Oct. 13, 1936
A-10	14,073	C. B. Cates	96.00	Oct. 22, 1936
[fol. 4]				
A-11	14,386	H. M. Peter	162.22	Nov. 4, 1936
A-12	15,004	C. R. Wallace	105.76	Nov. 10, 1936
A-13	15,252	C. R. Wallace	131.84	Nov. 18, 1936
A-14	15,392	B. Dubel	96.00	Nov. 23, 1936
A-15	15,610	F. A. Hart	105.76	Nov. 28, 1936
A-16	15,715	B. Dubel	105.76	Nov. 28, 1936
A-17	15,832	C. R. Wallace	96.00	Dec. 9, 1936
A-18	15,921	F. A. Hart	96.00	Dec. 15, 1936
A-19	15,925	C. B. Cates	96.00	Dec. 15, 1936
A-20	16,190	B. Dubel	96.00	Dec. 23, 1936
A-21	16,476	C. R. Wallace	147.50	Dec. 31, 1936
A-22	16,477	C. B. Cates	105.76	Jan. 12, 1937
A-23	16,478	H. M. Peter	147.50	Jan. 6, 1937
A-24	16,479	B. Dubel	105.76	Dec. 31, 1936
A-25	16,942	B. Dubel	96.00	Jan. 14, 1937
A-26	17,140	H. M. Peter	96.00	Jan. 18, 1937
A-27	17,811	F. A. Hart	147.50	Feb. 3, 1937
A-28	18,180	H. M. Peter	131.84	Feb. 17, 1937
A-29	18,181	C. R. Wallace	96.00	Feb. 17, 1937

Exhibit No.	Check No.	Payee	Amount	Date of Payment
A-30	18,256	C. B. Cates	96.00	Feb. 20, 1937
A-31	18,561	B. Dubel	105.76	Mar. 10, 1937
A-32	18,565	C. R. Wallace	105.76	Feb. 27, 1937
A-33	18,928	C. R. Wallace	147.50	Mar. 17, 1937
A-34	18,929	H. M. Peter	147.50	Mar. 17, 1937
A-35	18,989	B. Dubel	96.00	Mar. 17, 1937
A-36	18,990	F. A. Hart	96.00	Mar. 22, 1937
A-37	19,205	C. R. Wallace	105.76	Mar. 29, 1937
A-38	19,340	F. A. Hart	147.50	Apr. 3, 1937
A-39	19,590	C. B. Cates	96.00	Apr. 13, 1937
A-40	19,603	C. R. Wallace	96.00	Apr. 13, 1937
A-41	19,942	H. M. Peter	96.00	Apr. 17, 1937
A-42	20,440	F. A. Hart	96.00	Apr. 27, 1937
A-43	20,656	C. R. Wallace	147.50	May 5, 1937
A-44	20,806	E. W. Snedeker	147.50	May 6, 1937
[fol. 5]				
A-45	20,955	B. Dubel	96.00	May 17, 1937
A-46	21,024	H. M. Peter	147.50	May 17, 1937
A-47	21,145	W. W. Ashurst	96.00	May 17, 1937
A-48	21,244	C. B. Cates	96.00	June 24, 1937
A-49	21,585	H. M. Peter	131.84	June 7, 1937
A-50	21,774	B. Dubel	96.00	June 12, 1937
A-51	21,846	F. A. Hart	96.00	June 12, 1937
A-52	21,980	E. W. Snedeker	96.00	June 17, 1937
A-53	22,182	H. M. Peter	96.00	June 28, 1937
A-54	22,533	F. A. Hart	240.82	July 6, 1937
A-55	22,778	B. Dubel	172.60	July 14, 1937
A-56	23,375	R. H. Pepper	172.60	July 17, 1937
A-57	23,675	E. W. Snedeker	96.00	July 24, 1937
A-58	23,864	B. Dubel	96.00	Aug. 4, 1937
A-59	24,150	F. A. Hart	131.04	Aug. 4, 1937
A-60	25,073	H. M. Peter	125.76	Aug. 17, 1937
A-61	25,705	E. W. Snedeker	125.76	Sept. 2, 1937
A-62	25,796	E. W. Snedeker	164.64	Sept. 3, 1937
A-63	26,070	E. W. Snedeker	125.76	Sept. 15, 1937
A-64	26,078	B. Dubel	96.00	Sept. 18, 1937
A-65	26,212	H. M. Peter	147.50	Sept. 23, 1937
A-66	26,491	T. B. Jordan	164.64	Oct. 2, 1937
A-67	26,539	E. W. Snedeker	164.64	Sept. 30, 1937
A-68	26,540	H. M. Peter	131.84	Oct. 6, 1937
A-69	26,665	E. W. Snedeker	96.00	Oct. 11, 1937
A-70	26,772	H. M. Peter	105.76	Oct. 14, 1937
A-71	26,815	W. W. Ashurst	147.50	Oct. 18, 1937
A-72	26,980	B. Dubel	147.50	Oct. 18, 1937
A-73	27,350	E. W. Snedeker	164.64	Oct. 30, 1937
A-74	27,414	E. W. Snedeker	131.84	Nov. 3, 1937
A-75	27,519	E. W. Snedeker	96.00	Nov. 11, 1937
A-76	27,533	H. M. Peter	96.00	Nov. 13, 1937
A-77	27,751	E. W. Snedeker	125.76	Nov. 17, 1937
A-78	27,782	R. H. Pepper	96.00	Nov. 20, 1937

Exhibit No.	Check No.	Payee	Amount	Date of Payment
[fol. 6]				
A-79	27,935	B. Dubel	147.50	Nov. 30, 1937
A-80	28,075	H. M. Peter	164.64	Nov. 30, 1937
A-81	28,333	W. W. Ashurst	96.00	Dec. 10, 1937
A-82	28,341	E. W. Snedeker	96.00	Dec. 10, 1937
A-83	28,531	F. A. Hart	163.48	Dec. 17, 1937
A-84	28,535	B. Dubel	163.48	Dec. 17, 1937
A-85	28,650	E. W. Snedeker	125.76	Dec. 28, 1937
A-86	28,980	B. Dubel	105.76	Dec. 31, 1937
A-87	28,981	W. W. Ashurst	105.76	Dec. 31, 1937
A-88	28,982	H. M. Peter	164.64	Dec. 31, 1937
A-89	29,222	E. W. Snedeker	131.84	Jan. 14, 1938
A-90	29,390	F. A. Hart	96.00	Jan. 18, 1938
A-91	29,391	B. Dubel	105.76	Jan. 18, 1938
A-92	29,460	R. H. Pepper	96.00	Jan. 22, 1938
A-93	29,465	W. W. Ashurst	96.00	Jan. 22, 1938
A-94	30,288	H. M. Peter	164.64	Jan. 31, 1938
A-95	30,289	E. W. Snedeker	105.76	Feb. 2, 1938
A-96	30,356	R. H. Pepper	105.76	Feb. 7, 1938
A-97	30,480	E. W. Snedeker	125.76	Feb. 11, 1938
A-98	30,655	W. W. Ashurst	147.50	Feb. 15, 1938
A-99	30,792	R. H. Pepper	96.00	Feb. 24, 1938
A-100	31,024	B. Dubel	147.50	Feb. 28, 1938
A-101	31,056	E. W. Snedeker	164.64	Feb. 28, 1938
A-102	31,226	E. W. Snedeker	96.00	Mar. 12, 1938
A-103	31,230	B. Dubel	96.00	Mar. 12, 1938
A-104	31,429	H. M. Peter	147.50	Mar. 16, 1938
A-105	31,430	W. W. Ashurst	96.00	Mar. 16, 1938
A-106	31,586	E. W. Snedeker	147.50	Mar. 26, 1938
A-107	31,844	H. M. Peter	125.76	Apr. 2, 1938
A-108	31,967	B. Dubel	96.28	Apr. 6, 1938
A-109	32,110	E. W. Snedeker	96.00	Apr. 14, 1938
A-110	32,303	R. H. Pepper	96.00	Apr. 18, 1938
A-111	32,308	H. M. Peter	164.64	Apr. 18, 1938
A-112	32,311	E. W. Snedeker	164.64	Apr. 28, 1938
[fol. 7]				
A-113	32,745	F. A. Hart	163.86	Apr. 30, 1938
A-114	32,749	B. Dubel	163.86	May 3, 1938
A-115	33,112	E. W. Snedeker	96.00	May 18, 1938
A-116	33,620	B. Dubel	147.50	June 4, 1938
A-117	33,932	A. J. Cincotta	162.90	June 13, 1938
A-118	34,139	R. H. Pepper	96.00	June 23, 1938
A-119	34,314	E. W. Snedeker	96.00	June 27, 1938
A-120	34,625	E. W. Snedeker	164.64	July 5, 1938
A-121	34,847	J. H. Berry, Jr.	162.90	July 14, 1938
A-122	34,848	H. S. Wheeler	195.09	July 14, 1938
A-123	686	V. W. Worledge	182.90	Aug. 25, 1938
A-124	709	V. W. Worledge	31.68	Aug. 25, 1938
A-125	806	E. W. Snedeker	96.00	Aug. 26, 1938
A-126	859	James A. Hennessy	120.57	Aug. 31, 1938

Exhibit No.	Check No.	Payee	Amount	Date of Payment
A 127	1,114	E. W. Snedeker	164 64	Aug. 31, 1938
A 128	1,242	J. H. Berry, Jr.	162 90	Sept. 10, 1938
A 129	1,243	H. S. Wheeler	187 90	Sept. 10, 1938
A 130	1,575	E. W. Snedeker	96 00	Sept. 17, 1938
A 131	1,737	J. A. Hennessy	120 57	Sept. 26, 1938
A 132	1,754	F. C. Donald	182 90	Sept. 30, 1938
A 133	2,072	E. W. Snedeker	147 50	Oct. 5, 1938
A 134	2,176	G. A. Brace	139 57	Oct. 11, 1938
A 135	2,448	H. M. Peter	147 50	Oct. 15, 1938
A 136	2,450	R. H. Pepper	96 00	Oct. 15, 1938
A 137	2,549	E. W. Snedeker	96 00	Oct. 25, 1938
A 138	2,749	R. H. Pepper	147 50	Oct. 29, 1938
A 139	2,934	G. A. Brace	128 46	Nov. 3, 1938
A 140	2,964	E. W. Snedeker	164 64	Nov. 3, 1938
A 141	3,038	E. W. Snedeker	96 00	Nov. 8, 1938
A 142	3,118	V. W. Worledge	182 90	Nov. 10, 1938
A 143	3,119	James A. Hennessy	120 57	Nov. 16, 1938
A 144	3,333	E. W. Snedeker	147 50	Nov. 16, 1938

[fol. 8] IN UNITED STATES DISTRICT COURT

STIPULATION—Filed June 7, 1943

It is stipulated by and between the respective parties hereto that the defendant received notice of demand for the amount claimed by the plaintiff as set forth in the complaint on December 8, 1938.

Bernard J. Long, Assistant United States Attorney, Attorney for Plaintiff. George C. Gertman, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER—Filed March 5, 1943

By permission of the Court, the defendant substitutes this amended answer for the answer it heretofore filed.

1. Defendant admits that the plaintiff is a sovereign corporation but denies that in this type of case it enjoys any rights superior to those of any other suitor. Defendant denies that it owes the United States $18,060.83 and denies that the United States is equitably entitled to recover that

amount, with interest. Defendant says that the plaintiff redeemed the 144 checks over the period from July 14, 1936 to November 16, 1938, and in doing so it paid to defendant the aggregate amount of $18,060.83 under the circumstances hereinafter related, and not under the circumstances stated in the complaint.

2. Between July 14, 1936 and November 16, 1938 the plaintiff issued, at Marine Headquarters, Washington, [fol. 9] D. C., 144 checks for various amounts (photostatic copies of the checks are marked Exhibits A-1 to A-144) aggregating $18,060.83, payable to the order of the marine officers named therein, most of whom were stationed, and whose signatures were known at said Marine Headquarters. These checks, however, were not delivered to the payees themselves but were delivered to James H. Foley, a civilian employee, for delivery to them.

There was nothing about the checks to indicate that they were bogus as they were normal in form, each bore the stamp or seal of the United States, each was signed and validated by an officer of the United States vested with authority to sign checks in its behalf in payment of legitimate obligations. Under Section 31, Title 22, 1929 District of Columbia Code, each check carried the United States warranty that it was issued *bona fide* to each payee for value and had the object typed thereon. And in dealing with and handling these checks, defendant relied upon said warranty.

3. On or about November 21, 1938, the General Accounting Office at Washington, D. C., discovered that Captain James H. Berry, Junior, as payee, was not entitled to the check listed in Schedule B as A-121, No. 34847, of $162.90, which had been paid to defendant by the plaintiff on July 13, 1938. This discovery led to the further discovery by the plaintiff that all the 144 checks were bogus and that they had been surreptitiously issued and that all bore forged endorsements of the payees' signatures. Thereupon a letter dated November 21, 1938, signed by R. J. Moffett, Acting Comptroller General, calling attention to the discovery was sent to the Major-General Commandant, Marine Corps Headquarters, Washington, D. C., which, in due course, reached the hands of Brigadier-General Russell Putnam, the Paymaster of the United States Marine Corps, Washington, D. C., who, on November 22, 1938, officially ordered the Administrative Section of the Paymaster's Department

of the Marine Corps to make a thorough investigation of the activities in the Marine Corps Department of said James [fol. 10] H. Foley who was a civil service clerk C. A. F.—4. Upon learning of this ordered investigation Foley went to New York where he killed himself on November 22, 1938.

Upon completing its investigation about December 5, 1938, the Administrative Section aforesaid reported to Paymaster Putnam, *inter alia*, substantially as follows:

(a) The 144 checks were prepared by James H. Foley.

(b) The 144 checks were supported by travel or mileage orders and vouchers which Foley forged.

(c) No money was owing the payees of the checks for the object indicated on them.

(d) The 144 checks were presented by Foley to the disbursing officers who signed them without verifying the vouchers and documents which supported them.

(e) No payee of any check ever saw it or received the proceeds.

(f) No payee of any of the checks contributed to the fraud.

(g) The 144 checks were delivered by the plaintiff through its disbursing officers or paymaster to James H. Foley for delivery to the payees in the belief that they were lawfully entitled to receive them.

(h) Foley forged the signatures of the payees upon each check and either cashed or deposited it at The Anacostia Bank, Anacostia, D. C., where Foley maintained a checking account, and received the proceeds which he converted to his own use.

Thereupon, on February 6, 1939, the Acting Comptroller of the United States, I. N. Eliot, wrote the Secretary of the Navy and officially called his attention to the government's loss of $18,060.83 and the government's neglect which brought it about.

Thereafter, on or about May 1, 1939, pursuant to its appointment by the Secretary of the Navy, a Board of Inquiry was convened at Marine Corps Headquarters, Washington, D. C., for the purpose of "inquiring into the cir- [fol. 11] cumstances and the general activities of James H. Foley who defrauded the United States of $18,060.83 and the circumstances which made the execution of such fraud possible." The findings of the Board of Inquiry have not been made public.

4. Foley was well known to the paymaster and disbursing officers of the United States Marine Corps at its Headquarters, Washington, D. C., and until November 21, 1938 he enjoyed the highest reputation for honesty and integrity. Owing to this Foley was allowed free access to all blank forms of the Marine Corps, including blank checks of the United States.

5. As the 144 checks were issued and turned over to Foley for delivery, Foley, after first forging the payees' signatures upon them, either cashed or deposited them to his credit at The Anacostia Bank, Anacostia, D. C., where he was favorably known and had carried a checking account for about twelve years.

The Anacostia Bank, having the same faith and confidence in Foley as his superior officers in the Marine Corps, did not question Foley regarding the genuineness of the payees' endorsements but accepted the checks upon the plaintiff's warranty of their genuineness and in the belief that they bore the genuine signatures of the payees. Foley withdrew the proceeds of all the checks deposited to his credit before his forgeries were discovered.

Thereupon, as the checks were cashed or deposited by Foley during the twenty-eight months, The Anacostia Bank endorsed each check and transmitted it to the defendant for collection to its account. Relying upon the plaintiff's aforesaid warranty of their genuineness and believing that they bore the genuine signatures of the payees, defendant, as the checks were received by it from The Anacostia Bank, placed the following printed endorsement on the back of each check:

> [fol. 12] "Pay to the order of any Bank, Banker or Trust Co. Prior endorsements guaranteed. National Metropolitan Bank, Washington, D. C."

This endorsement was made through the means of a rubber stamp and it is the same endorsement which defendant uniformly used on all legitimate government checks when presented at the Treasury for payment and redemption. Defendant denies that it used the endorsement "prior endorsements guaranteed" for the purpose or with the object of inducing the United States to pay to it the amounts of the checks. A similar endorsement was first placed upon each check by The Anacostia Bank and, in so doing,

that Bank acted in good faith, in ignorance of the forgeries and in the belief that the payees' signatures upon each of the checks was genuine and true. Defendant says that it did not negotiate the checks to the plaintiff when it so endorsed them and that its endorsement amounted to nothing more than a receipt for the proceeds. In any event the endorsement added nothing extra to the normal liability of an endorser of valid negotiable paper. It is denied that the endorsement amounted to a guaranty of the payee's signature. See United States v. Guaranty Trust Co. of New York, 293 U. S. 340.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment applied by the plaintiff to each of the checks that "* * * said Treasurer, believing said false, forged and counterfeit endorsement to be the true and genuine signature of the payee named on the face of the check, paid to the defendant the amount thereof." But defendant says that it is its belief that the Treasurer, in redeeming said checks, paid the money upon each check in the belief that it was issued *bona fide*, was payable to the order of a *bona fide* payee, was given in payment of a lawful obligation and that each bore the genuine endorsement of the payee.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment applied by [fol. 13] the plaintiff to each check that "* * * said Treasurer, relying upon the guaranty of the defendant as to the validity of the endorsements upon the said checks, and solely because thereof, paid to the defendant the amounts of the said checks on the dates set out in Exhibit B annexed hereto." Defendant says, as aforesaid, that it is its belief that the Treasurer, in redeeming the said checks, paid the money called for by them in the belief that they were issued *bona fide*, to a *bona fide* payee, in payment of a lawful obligation and that each check bore the genuine endorsement of the payee.

Relying upon the plaintiff's warranty of the genuineness of the checks and believing them to bear the genuine signatures of the endorsers, and in ignorance of their forgery and of their being bogus in their inception, defendant, as each check was received by it for collection, as aforesaid, presented it to the Treasurer of the United States for payment and redemption and upon collecting the proceeds

placed the same upon its books to the credit of The Anacostia Bank, Anacostia, D. C.—the cashing Bank—and thereafter, in the regular course of business, and before the discovery of the forgeries, defendant paid over the proceeds of said checks to said Anacostia Bank. Defendant never received nor did it exact any compensation or profit for its services in that behalf and throughout its dealings with the plaintiff in connection with said checks it acted with the utmost good faith.

Defendant was not informed of the forgeries until some time during the months of November and December, 1938, and until that time defendant was ignorant thereof, as was also The Anacostia Bank. Defendant further says that neither it nor The Anacostia Bank learned that the checks were bogus in their inception and that the government's warranty of their genuineness was untrue until the hearing took place before the Board of Inquiry at Marine Corps Headquarters.

[fol. 14] Defendant admits that the plaintiff, upon discovering that it had unwittingly issued the bogus checks which it had warranted as genuine ones and that its employees had forged them, attempted to escape the obligation of its warranty and the result of its neglect in issuing and delivering the checks by shifting from itself to the defendant the responsibility for the loss. In making its demand for restitution upon the defendant, the plaintiff ignored its own unintentional culpability in the creation and negotiation of the checks and the vital fact that it, itself, was the first who dealt with the forger and that it, itself, placed in his hands the means which he used to delude the public and obtain money unlawfully.

6. Defendant says that the plaintiff owes to the public the duty to issue only legitimate checks to legitimate creditors of the government and that if it issues fictitious checks, warranting them to be genuine, equity and fair play require that it should bear the loss.

7. Owing to the confidence reposed in Foley by the officers of the Administrative Section or Division and by the disbursing officers of the Marine Corps Headquarters, and owing to their neglect of duty in failing to check or supervise his work, Foley, on 144 occasions between July 1936 and November 1938, successfully defrauded the United

States by obtaining money unlawfully, by the means herein stated, in the aggregate amount of $18,060.83. In each instance, and in the presence of his superior officers, Foley took four successive steps in natural sequence to accomplish his felonious purpose. In each instance his first step was to fill in available blank travel orders. This involved the forging of not less than four marine officers' names. Using this fictitious and forged document to support the voucher, Foley's next step was to fabricate a fictitious travel or mileage voucher. This also involved the forging of the signature of the ostensible marine officer claimant. Foley's next step, which followed in natural sequence, was to write the check and make it payable to the order of the ostensible [fol. 15] payee for the amount of the spurious voucher and present it to the disbursing officer or paymaster for signature and validation. Sometimes, either before or after the check was validated, Foley would write "pay" in the place of "mileage" upon the check. Without verifying the documents and without making any examination to determine whether the United States owed money to the payees of the checks for the object typed thereon, or otherwise, the disbursing officers or paymaster signed and validated the checks in reliance upon their faith in Foley and delivered them to him for delivery to the ostensible payees. Having thus obtained possession of the means by which to delude the public, Foley's final step was to forge the ostensible payee's signature and after endorsing the check himself, he either cashed or deposited it at The Anacostia Bank.

8. Many years ago the United States Marine Corps, in obedience to the Act of Congress of August 23, 1912, 37 Stat. 375, set up a section or division in the United States Marine Corps Headquarters, Washington, D. C., known as the Administrative Section or Division of the United States Marine Corps, which was specifically charged with the duty of preauditing, examining and checking all accounts and claims against the United States arising in the Marine Corps. Its duties also included the examination and preaudit of all documents such as payrolls, mileage or travel orders, to determine their legitimacy and if they were found genuine and correct it was the duty of this Division to prepare checks for presentation to the disbursing officers or paymaster for their signatures and validation. And being so created to represent and protect the United

States and the public from fraud, imposition and loss, the Administrative Section neglected its duty and obligation by allowing and permitting Foley to (1) prepare payroll vouchers and travel and mileage vouchers for marine officers without its supervising, examining, preauditing or checking his work, and (2) write and prepare checks in [fol. 16] payment of officers' pay and officers' mileage and travel expenses without its supervising the same and in violation of its duty.

The said Administrative Section was also specifically charged by law with the duty of post-auditing the accounts of all paymasters and disbursing officers of the Marine Corps before certifying them to the General Accounting Office of the United States for supplemental audit and check; such post-audit involved the inspection, examination and verification of all orders, documents and vouchers which supported the issued checks. Being so charged to represent and protect the United States and the public from fraud, the Administrative Section neglected its duties to the United States and to the public by failing in its original post-audit to make such examination and inspection as would timely unearth Foley's fraud as it was being committed by him. It is a fact, however, that this Administrative Division or Section, using the files available in the office of the Marine Corps Headquarters, did unearth Foley's fraud and turpitude within fifteen days after it was called to its attention by the General Accounting Office.

9. The disbursing officers and paymaster who signed and validated the checks were specifically charged by law with the duty, before disbursing public funds, of ascertaining whether the United States actually was indebted to the payees of the checks in the amount called for and the object typed thereon. But the disbursing officers and paymaster neglected their duty in this regard. Furthermore, defendant says that plaintiff knew from its records and accounts, if they had been examined beforehand, that it was not indebted to the payees of the checks in the amount or for the object typed thereon or for any other object.

10. In its dealing with these checks defendant believed that they were issued by the government in the regular course of its business; defendant supposed that they were being issued direct to the payees for legitimate purposes [fol. 17] and not to the forger for illegitimate purposes;

defendant supposed that each rightful payee obtained possession of the check and rightfully endorsed it. And when the government unintentionally issued these checks and put them in the forger's hands, it deprived the public of the protection which normal legitimate checks carry as a legitimate check must be lost or stolen to suffer a forgery, whereas these checks, being the product of an "inside job," were predestined to be forged.

This is not the case of a suit against a cashing bank whose negligence in cashing the checks would offset the government's neglect in issuing them, but it is a suit against a collecting bank which is not guilty of any negligence contributing to the success of the forgery. The law of the case is ruled in part by Holley v. Missionary Society, 180 U. S. 284, and United States v. Chase National Bank, 252 U. S. 485.

The case of United States v. National Exchange Bank of Providence, 214 U. S. 302, was a suit against the negligent cashing bank.

11. Section 24, Title 22, 1929 District of Columbia Code being a part of the Negotiable Instrument Statute, provides—

> "Where a signature is forged or made without the authority of the person whose signature it purports to be it is wholly inoperative, and no right to redeem the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority."

This Statute states the general rule as contended for in this case by the plaintiff. But this Statute also contains an exception to the general rule, which exception the United States disregards but upon which defendant relies. The [fol. 18] exception, as stated in the Statute, is that the general rule applies—

> "unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority."

This exception to the general rule springs from the just and equitable principle recognized in all jurisdictions that where one of two innocent persons must bear a loss, it must be borne by the one whose conduct made it possible.

The loss which the plaintiff sustained is traceable direct to the issuance of the checks and placing them in the forger's hands. No bad faith or negligence, traceable to defendant—the collecting Bank—contributed to the payment of the checks or their forgery. The forgery of the checks deprived nobody of title, as would be the case if the checks had been genuine and normal. In paying over the money to the defendant, as the possessor of the checks, the United States redeemed its own spurious paper which it had unwittingly issued and which had entrapped an innocent bank. On the other hand, the United States put the bogus checks into circulation and warranted them as genuine. The United States was the first to contact and deal with the forger, whereas defendant never dealt with him. The checks were not owned by anybody, *i. e.*, nobody had title to them. The United States was the first to repose confidence in Foley and it, itself, put in Foley's hands the instruments which he used to rob the cashing bank. Thereby the United States invited and facilitated the forgeries.

The warranty of the government under Section 31, Title 22 of the 1929 District of Columbia Code, that the checks were issued for a valuable consideration, and its warranty under Section 91 of said Title and Code that the payees of the checks were *bona fide* entitled to them and that they could rightfully endorse the same misled defendant into endorsing and cashing them because it says that if it had known the facts as set up in this answer, it would not have [fol. 19] endorsed nor collected the checks. In representing and warranting to the defendant that these checks were *bona fide* in all respects, and the defendant having acted upon the belief that said warranties were true, plaintiff disarmed it of the protection which the warranties would have carried if true. Defendant says that the initial misrepresentation of the government that these checks were genuine in all respects lulled it into a sense of false security; that if the representations of the government to the public that the checks were genuine in all respects had been true, the checks would have reached the payees' hands in the regular course of business and there would have been no forgeries and no loss.

12. Defendant further says that owing to its confidence reposed in Foley, the United States intrusted and delegated to him power and duty, without his work being checked or supervised by any officials of the Marine Corps Headquarters, to prepare payrolls and mileage or travel vouchers for marine officers and to certify them to the disbursing officers or paymaster for their signatures upon the checks. And to perform this delegated duty the United States made available to Foley the necessary blanks and blank checks. Under this duty it was also Foley's duty, before drawing the checks, to verify all documents supporting the vouchers to determine their authenticity and legitimacy. Under the delegated power and authority it was also Foley's duty to certify the checks, with accompanying vouchers and supporting documents, to the disbursing officers for signature, which he did in these 144 instances. Foley performed this duty faithfully and honestly for many years. While it was the duty of the disbursing officers, before signing the checks, to make an independent examination to determine the legitimacy of the checks, they, owing to the power and duty thus conferred upon Foley, perfunctorily signed the checks in question. The signatures of the disbursing officers upon the checks being routine only, the [fol. 20] checks in question were bearer paper negotiable by delivery. Paragraph Third of Section 10, Title 22, 1929 District of Columbia Code—being part of the Negotiable Instruments Law.

For the reasons and upon the grounds stated in this answer, defendant says that the aforesaid statutory exception to the general rule applies and that under the facts and circumstances the government is estopped from questioning the genuineness of the employee-forger's endorsement of the ostensible payees' signatures.

Finally, defendant invokes the equitable principle, always applicable as a defense in bar to a suit of this type—money had and received—that—

> "Where one or the other of two innocent persons must suffer loss from the fraud or misconduct of a third person, in whose honesty both have reposed confidence, he who first reposes confidence and intrusts him, the third person, with the means by which he may perpetrate the fraud, must bear the loss."

And having fully answered the complaint, defendant prays that it be dismissed.

George C. Gertman, Attorney for Defendant, American Security Building, 730 15th Street, Washington, D. C.

The defendant demands a trial by jury.

George C. Gertman, Attorney for Defendant.

Service of copy of the foregoing Amended Answer acknowledged this 3rd day of March, 1943.

Grace B. Stiles, Asst. U. S. Atty., of Counsel for Plaintiff.

[fol. 21] IN UNITED STATES DISTRICT COURT

AMENDMENT TO AMENDED ANSWER—Filed March 5, 1943

By permission of the Court the defendant amends its amended answer as of the date of the filing thereof, by adding thereto the following:

The first check issued, the one for $172.60 to Lieut. Colonel C. B. Cates, was redeemed by the plaintiff July 14, 1936, but Foley's fraud upon the Government preceded its issuance, documentary evidence of which was of record in the Office of the Marine Corps Headquarters. Foley's fraud, however, was not detected earlier because no supervision was exercised over his work and no preaudit or postaudit of the documents and vouchers supporting the checks was made, though if made the fraud and deceit would have been instantly exposed, as it was two years afterwards when the records and accounts were examined and audited. It was the fraud practiced upon the Government that exposed Foley's rascality; not the fraud and deceit which he practiced upon the cashing bank. The plaintiff, at this late date, wants the defendant to correct its mistake in accrediting the Cates and other checks as genuine, but it suggests no reparation for its own culpable negligence, but for which there would have been no forged checks.

After the redemption of the Cates' check the plaintiff was put upon inquiry to ascertain whether the check was genuine and legitimate and to promptly communicate with defendant the result of the inquiry if the check were found to

be bogus and the endorsement forged in order that, in subsequent cases, the defendant might not be prejudiced by handling checks bearing Foley's signature. Defendant was justified in assuming that this duty was being performed promptly as the means of knowledge were within the plaintiff's reach. Besides, most if not all of the payees of the checks were detailed at Marine Headquarters and their signatures were well known there. It is true that verification [fol. 22] of the Cates' check and examination of the accounts, after the check had been redeemed, would not have prevented a legal loss by the plaintiff in that instance; it would, however, have prevented the successful repetition of continuous frauds. Therefore, when the Government continued, as it did, on 143 other occasions to issue spurious checks as genuine ones, it reaffirmed the authenticity of each check. But instead of the Government ascertaining the truth, as these checks were being successively issued and redeemed, it waited until Foley was dead. The loss which the plaintiff has sustained was not the consequence of the forgeries of the payees' names but the consequence of the unlawful issuance of spurious checks as genuine ones. Upon this defense, regardless of other defenses, defendant is entitled to a trial by jury. Leather Mfg. Bank v. Morgan, 117 U. S. 96.

George C. Gertman, Attorney for Defendant.

Service of copy of foregoing accepted. No objection to its filing.

Bernard J. Long, Assistant U. S. Attorney, of Counsel for Plaintiff.

Permission given to file the foregoing amended answer as of March 5, 1943. This amendment was considered by the Court in conjunction with the original amended answer before the entry of judgment in this case upon the plaintiff's motion.

F. Dickenson Letts, Justice.

In United States District Court

Motion for Judgment on the Pleadings—Filed March 22, 1943

The plaintiff moves the Court as follows:

1. To enter judgment for the plaintiff as prayed for in the compliant upon the pleadings, because from the complaint [fol. 23] filed on behalf of the plaintiff, together with the amended answer filed on behalf of the defendant, there is no genuine issue as to any material fact and the plaintiff is entitled to judgment as a matter of law.

Edward M. Curran, United States Attorney; Bernard J. Long, Assistant United States Attorney, Attorneys for Plaintiff.

In United States District Court

Order Directing Clerk to Transmit Original Photostatic Copies of Checks, Being Exhibits A-1 to A-144—Filed June 15, 1943

Upon oral motion of the defendant, it is by the Court this 15th day of June, 1943, Ordered that in the preparation of the record on the defendant's appeal from the judgment entered in this action on June 9, 1943, the Clerk of the Court shall transmit to the United States Court of Appeals for the District of Columbia, with the record, the original photostatic copies of checks filed with the complaint and marked Exhibits A-1 to A-144.

F. Dickenson Letts, Justice.

Consent given:
Bernard J. Long,
Asst. United States Attorney.

In United States District Court

Judgment—Filed June 9, 1943

Upon consideration of the motion for judgment on the pleadings filed on behalf of the plaintiff, United States of America, it is by the Court this 9th day of June, 1943, [fol. 24] Ordered, Adjudged and Decreed, That judgment be and the same hereby is entered for the plaintiff in the

total sum of $18,060.83, together with interest at 6% from August 11, 1942 and costs.

F. Dickenson Letts, Justice.

No objection to form:
George C. Gertman,
Attorney for Defendant.

Defendant notes an exception to the above order.

IN UNITED STATES DISTRICT COURT

ORDER AUTHORIZING DEFENDANT TO DEPOSIT IN THE REGISTRY OF THE COURT $22,000.00 IN CASH IN LIEU OF A SUPERSEDEAS BOND—Filed June 15, 1943

Pursuant to Rule 73 (d) of the Rule of Civil Procedure for the District Courts of the United States, it is by the Court this 15 day of June, 1943, Ordered that in lieu of the filing of a supersedeas bond in the penalty of $22,000.00, with sureties to be approved by the Court, the defendant is hereby authorized and allowed to deposit in the Registry of the Court the sum of $22,000.00, and when so deposited the same shall stand accepted in the place of a supersedeas bond in that amount and operate to supersede the execution of the judgment entered in this action pending the final disposition of the defendant's appeal to the United States Court of Appeals for the District of Columbia.

F. Dickenson Letts, Justice.

Consent is hereby given to the above order:
United States of America,
By Bernard J. Long,
Asst. United States Attorney.

[fol. 25] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed June 15, 1943

Notice is hereby given this 15th day of June, 1943, that the defendant, The National Metropolitan Bank, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 9th day of June, 1943, in favor of the plaintiff against said

defendant for $18,060.83, with interest at 6% from August 11, 1942, and costs.

George C. Gertman, Attorney for Defendant, The National Metropolitan Bank.

Acknowledgment is hereby made of service of copy of the foregoing notice of appeal.

United States of America,
By Bernard J. Long,
Asst. United States Attorney.

MEMORANDUM

June 15, 1943.

Copy of Notice of Appeal mailed by Clerk to U. S. Attorney.

Deposit by Gertman into Registry of the Court of $22,000.00 in cash in lieu of Supersedeas Bond.

IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS ON WHICH THE DEFENDANT (APPELLANT) INTENDS TO RELY ON ITS APPEAL—Filed June 15, 1943.

The District Court, upon the pleadings and the law applicable thereto, erred as follows:

[fol. 26] 1. In granting the plaintiff's motion for summary judgment on the pleadings.

2. In entering the appealed judgment.

3. In adjudging that under no aspect of the defense is defendant equitably entitled to trial by jury.

4. In adjudging that in equity and justice there is no difference, from the Government's standpoint, between a check issued lawfully for a legitimate purpose to a bona fide payee for value which is lost and forged and a check issued unlawfully for an illegitimate purpose to a fictitious payee and delivered by it into the hands of the forger who forges it.

5. In adjudging that though the plaintiff dealt direct with the forger in 144 separate transactions, and it, itself, placed in his hands worthless checks totalling $18,060.83 as the means with which to successfully carry out his forgeries to fruition, the good faith and innocence of the defendant which never dealt with nor contacted the forger may be disregarded as immaterial.

6. In adjudging that defendant must pay the Government $18,060.83 and about $1,000.00 interest, besides costs, because it innocently turned in, bearing forged payees' endorsements, the 144 checks which the Government years ago issued contrary to prohibition of statutory law in payment of nonexistent obligations, and which it actually placed in the hands of the forger who forged the endorsements.

7. In adjudging that the Government may issue 144 checks contrary to prohibition of statutory law, make them payable to fictitious payees presumably in payment of existing obligations, put them in circulation by placing them in the forger's hands, and be wholly immune from the consequences when they turned up in innocent hands bearing forged endorsements of the payees' names.

8. In adjudging that through its dealings with the 144 checks during the 2¼ years, defendant became an indemnitor of the Government against loss through the issuance of the checks which were not susceptible of genuine endorsements.

[fol. 27] 9. In adjudging, as inapplicable, the equitable principle that where one of two innocent persons must suffer loss by the wrongdoing of a third person, the one whose fault made the loss possible and facilitated it should bear the loss.

10. In adjudging that the plaintiff, as a matter of equity, is entitled to judgment on the pleadings for the money sued for, with interest and costs.

11. In adjudging that there was no duty devolved upon the Government at any time, and especially either before the issuance or after the redemption of the first check, to promptly uncover Foley's initial fraud so as to prevent its recurrence and repetition 143 times, and in adjudging that the question of the Government's reasonable diligence in this regard is immaterial.

12. In adjudging that defendant was not justified in believing that since no notice had come from the Government regarding the invalidity or forgery of any check, defendant could continue to receive and accredit the checks as genuine ones.

13. In adjudging that the plaintiff is not the author of its own loss.

14. In adjudging that the equities of the plaintiff are superior to the defendant's.

15. In adjudging that the money sued for *ex acquo et bona* belongs to the plaintiff.

16. In adjudging that it would be unconscientious not to require the defendant to return the money even though it paid it over to the forwarding bank years ago and long before the discovery that the checks were bogus.

17. In adjudging that the efficient cause of the loss was not the Government's negligence and carelessness in issuing the checks.

18. In attributing negligence to the defendant and in ignoring plaintiff's negligence.

Dated, June 15, 1943.

George C. Gertman, Attorney for Defendant

[fol. 28] Service of copy of the foregoing points and authorities acknowledged this 15 day of June, 1943.

Bernard J. Long,
Asst. United States Attorney.

IN UNITED STATES DISTRICT COURT

DESIGNATION OF RECORD—Filed June 15, 1943

Pursuant to Rule 75 (f) of the Rules of Civil Procedure for the District Courts of the United States, it is hereby stipulated and agreed between the parties that the following shall constitute the record on appeal from the judgment entered in this action against the defendant on June 9, 1943:

1. The complaint with Exhibit B, and the date of the filing thereof. Also stipulation as to amendment of the

complaint filed June 7, 1943. Also the original photostatic copies of Exhibits A-1 to A-144 filed with the complaint. Counsel will obtain an order of the Court directing that the original photostatic copies of Exhibits A-1 to A-144 now on file be transmitted with the record but counsel agree that Exhibits A-1 to A-144 are not to be included in the appendix to appellant's brief or printed in the Court of Appeals.

2. Defendant's amended answer and the date of filing. Also, with it and as a part thereof, the amendment to the defendant's answer filed June 9, 1943, with copy of the District Court's order written thereon.

3. Plaintiff's motion for judgment on the pleadings and the date of filing.

4. Defendant's reply and points and authorities, and the date of the filing thereof, in opposition to the plaintiff's motion for judgment on the pleadings. It is agreed that owing to its length this need not be printed in the appellant's appendix to its brief.

[fol. 29] 5. Order of the Court on June 15, 1943, directing the Clerk of the Court to transmit with the record on appeal the original photostatic copies of the checks involved, being Exhibits A-1 to A-144, both inclusive.

6. Copy of the minute entry, and date thereof, of the judgment entered by the Court against the defendant on June 9, 1943, on the plaintiff's motion. Let this entry also show that the defendant noted an exception to the entry of the judgment.

7. Copy of the order of the Court of June 15, 1943 authorizing the defendant to deposit in the Registry of the Court $22,000.00 cash in lieu of the filing of a supersedeas bond.

8. Memorandum of the Clerk of the District Court showing the deposit of $22,000.00 in the Registry of the Court, and the date of the deposit thereof.

9. Defendant's notice of appeal from the judgment entered against it on June 9, 1943, and date of filing thereof.

10. Copy of appeal and memorandum or certificate of the Clerk of the District Court showing date of his mail-

ing or serving upon plaintiff's counsel of copy of notice of defendant's appeal.

11. Copy of defendant's points relied on on appeal and date of its filing, and acknowledgment by plaintiff of service of copy thereof.

12. Copy of this agreed designation of record.

This stipulation entered into this 15 day of June, 1943.

United States of America, *Plaintiff*, By Bernard J. Long, Asst. United States Attorney. The National Metropolitan Bank, *Defendant*, By George C. Gertman, *Its Attorney*.

[fol. 30] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 8562

NATIONAL METROPOLITAN BANK, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the District of Columbia

Argued March 16, 1944. Decided May 1, 1944

Mr. George C. Gertman for appellant.

Mr. Robert Kaplan, member of the Bar of the Supreme Court of Massachusetts, *pro hac vice*, by special leave of court, with whom *Messrs. Francis M. Shea*, Assistant Attorney General, *Edward M. Curran*, United States Attorney, *Charles B. Murray*, Assistant United States Attorney, and *Leavenworth Colby*, Attorney, Department of Justice, were on the brief, for appellee. *Mr. Daniel B. Maher*, Assistant United States Attorney, also entered an appearance for appellee.

Before Groner, C. J., and Edgerton and Arnold, JJ.

OPINION—Filed May 1, 1944

GRONER, C. J.:

National Metropolitan Bank appeals from a judgment of the District Court in favor of the United States in the sum of $18,060.83. Judgment was entered summarily by the District Court on the authority of *Washington Loan & Trust Co.* v. *U. S.*, 77 U. S. App. D. C. 284, 134 F. (2d) 59. The facts here are these:

James H. Foley was a civilian clerk in the Headquarters office of the Paymaster of the United States Marine Corps in Washington City. He was assigned to prepare officers' pay and mileage vouchers, to prepare checks in payment thereof, to present the checks for signature by the Paymaster or other disbursing officers duly authorized to draw checks on the Treasury, and to deliver the signed checks to the named payees. From time to time during a period of twenty-eight months, beginning shortly before July 13, 1936, and ending November 14, 1938, Foley forged pay and travel mileage vouchers, together with the necessary supporting travel orders, and prepared one hundred and forty-four Treasury checks for payment of the amounts of the forged vouchers and orders. In the ordinary course he presented the checks to the Paymaster, who signed them. All were payable to one or another of sixteen actually existing Marine officers stationed in Washington. None of the [fol. 31] payees was entitled to the proceeds of the checks or had any knowledge of the fraud. The signed checks were returned to Foley for distribution to the several officers, but Foley, instead of delivering the checks, forged the signatures of the payees, added his own name as second endorser, and cashed or deposited them with the Anacostia Bank of Anacostia, District of Columbia. That bank made no investigation of the genuineness of the payees' signatures, but took the checks in reliance on Foley, stamped them with the endorsement—"Pay to the order of any Bank, Banker or Trust Company. Prior endorsements guaranteed," and transmitted them to the National Metropolitan Bank (appellant) for collection. The latter bank likewise so endorsed the checks, presented them to the Treasury and received payment. It credited the collections to the Anacostia Bank in the regular course of business and paid over the proceeds prior to the discovery of the for-

geries in November, 1938, and the Government's demand on appellant of repayment in December, 1938.

The Paymaster who signed the checks was unaware of the fraud, having relied upon Foley's reputation for honesty.

In the *Washington Loan & Trust Co.* case, relied upon by the lower court, the facts were these:

In 1933 Civilian Conservation Camps were, by order of the President, established throughout the United States. The Chief of Finance of the United States Army was made disbursing officer of the funds allocated to the camps. Stitely, the person responsible for the forgeries, was chief of the voucher unit of the accounts section of the Park Service, whose duty it was to prepare bi-monthly payroll vouchers in the names of employees of the Service, present them to the disbursing officers and receive and distribute the checks payable to such employees. For four years Stitely made up fraudulent payroll vouchers for fictitious and non-existent employees of an imaginary camp. These he took to the office of the Chief of Finance each pay day and received checks payable to the persons on the legitimate and also on the fraudulent payrolls. The checks on the fraudulent payrolls he retained, forged the signatures of the payees and cashed or deposited them to his account in one of the banks, defendants in the suit. After four years his frauds were discovered and suit was brought by the United States to recover the amounts paid to the banks on account of the forged checks.

From these statements of facts it will be seen that in both cases the checks were drawn by one agency of Government on another, were issued on fraudulent vouchers to payees to whom the United States owed nothing; in each the names of the payees were forged by a dishonest employee of the United States; in each the United States was negligent in not sooner discovering the frauds; and in each the checks were cashed or deposited in banks and the sum of the checks thereafter paid on demand by the United States on the faith of the banks' guarantee of all endorsements. This we said in the *Washington Loan & Trust Co.* case was enough to entitle the United States to recover, notwithstanding the negligence in the issuance of the checks or the unreasonable length of time before discovery of the forgeries, since the Government as drawer and drawee

owed no duty to the banks with reference to the endorsements, whereas it was the obligation of the banks, at their peril, to be sure the endorsements which they guaranteed were genuine.

> [fol. 32] "In other words, the failure of the Government to detect the fraud, though due to negligence, was not the cause of the loss, since in the whole transaction, the Government and the bank dealt at arm's length, and the primary obligation of the bank to see, to the genuineness of the endorsements continued throughout." (134 F. (2d) p. 62.)

And though we noticed and referred to a number of exceptions to the rule which in particular circumstances would bar the drawer or drawee from recovery, we found in that case no facts to bring it within any of the exceptions. We think this is also true of the instant case, but counsel for appellant very earnestly urges that there *are* material differences. One, he insists, is that here the defendant bank was only a collecting agent of the bank in which the checks were first deposited and hence is liable only if it is shown it was itself at fault. Another, that being only a collecting bank and having paid over the proceeds to its principal before notice of the forgery, it is thereby relieved of liability. The first of these points was considered by us in the former case and rejected on the ground, as we have seen, that appellant (bank), as holder, was under a statutory [1] duty to determine the genuineness of the endorsements, and when it presented the checks for payment with a warranty, express or implied, that the endorsements were in all respects regular, it thereby made itself liable to the drawer or drawee if it afterwards was shown that they were forged. *Clearfield Trust Co.* v. *U. S.*, 318 U. S. 363-8. The second, we think, is equally without merit, for it wholly overlooks the fact that nothing appears in the circumstances accompanying the collection to put the Treasury on notice that appellant was acting, as is now claimed, only as collecting agent for the Anacostia Bank. In presenting the checks appellant did not, as it might have done, designate or identify itself as agent or trustee for collection, nor did it represent itself as acting only "for the account" of the Anacostia Bank. Cf. Sec. 36, *N. I. L.*, D. C. Code 1940, Sec. 28-307, and

[1] D. C. Code 1940, Sec. 28-124.

see *Interstate Tr. Co.* v. *U. S. Nat. Bk.*, 67 Colo. 6, 185 Pac. 260. Instead, it endorsed the checks so as to imply to the drawee that prior payment had been made to and acknowledged by the identical persons named as payees. This warranty the United States was entitled to rely on and did rely on, and since it was false, it is now too late to claim that as presenting bank appellant acted only as agent for another. The unconditional demand for payment was, as we held in the *Washington Loan & Trust Company* case, a representation of valid title in the demanding bank and a certification that all prior endorsements were regular and valid and entitled the holder to receive the proceeds, *Clearfield Trust Co.* v. *U. S.*, *supra*. In such circumstances the universal rule is that a general endorsement by the demanding bank is the equivalent that it has valid title to the check and to the proceeds in its own right. If we are correct in thinking this is the rule, then obviously it must make restitution when its warranty is shown to be untrue. See *U. S.* v. *Nat. Exch. Bank of Providence*, 214 U. S. 302; *Insurance Co.* v. *Fourth Nat. Bk.*, 12 F. (2d) 100; *Fulton Nat. Bk.* v. *U. S.*, 107 F. (2d) 86; *Farmers State Bk.* v. *U. S.*, 62 F. (2d) 178; *District Nat. Bk.* v. *Washington Loan & Trust Co.*, 62 App. [fol. 33] D. C. 198, 65 F. (2) 831; *Clearfield Trust Co.* v. *U. S. supra*; *Hartford-Conn. Trust Co.* v. *Riverside Trust Co.*, 123 Conn. 616, 197 Atl. 766, and cases cited in *Washington Loan & Trust Co.* v. *U. S.*, *supra*. Appellant's cases have all been carefully reviewed and considered and we think do not change the result.

Affirmed.

[fol. 34] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1944

No. 8562

THE NATIONAL METROPOLITAN BANK, a Corporation, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the District of Columbia.

JUDGMENT—Filed May 1, 1944

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Mr. Chief Justice Groner.

Dated May 1, 1944.

[fol. 35] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed May 9, 1944

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above entitled cause, and include therein the following:

1. Appendix to the main brief of the appellant.
2. Opinion of the Court dated May 1, 1944.
3. Final judgment.

4. This designation.
6. Clerk's Certificate.

Geo. C. Gertman, Attorney for Appellant.

Service of copy of the foregoing designation of record acknowledged by appellee this 9th day of May, 1944.

Charles B. Murray Asst. U. S. Att'y, of Counsel for Appellee.

[fol. 36] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 37] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Murphy took no part in the consideration or decision of this application.

Endorsed on cover: File No. 48,614. U. S. Court of Appeals, District of Columbia. Term No. 161. National Metropolitan Bank, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed June 14, 1944. Term No. 161, O. T., 1944.

FILE COPY

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

October Term, 1944

No. 161

NATIONAL METROPOLITAN BANK, a corporation,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

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WILSON PRINTING CO., WASHINGTON, D. C. – BRANCH P. EPES, MANAGER

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IN THE

Supreme Court of the United States

October Term, 1944

No.....

NATIONAL METROPOLITAN BANK, a corporation,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE MATTER INVOLVED

During 2 1/3 years beginning July 13, 1936 and ending November 16, 1938, the United States, through its Paymaster of the United States Marine Corps Headquarters, Washington, D. C., validated and issued 144 Treasury checks totalling $18,060.83 drawn payable to the order of 16 marine officers stationed at that Headquarters. These checks were normal in appearance, bore the seal of the United States and had stated on them the object for which they were issued, namely, "pay" or "mileage." They

inherently carried the Government's warranty of authenticity and their issuance for value; also its engagement, as primary obligor, to pay them upon presentment. D. C. Code (1940), Vol. 2, ss. 28-201-501-502.

Yet after all of them had run their course as normal Treasury checks and were redeemed at the Treasury as such, the General Accounting Office discovered that James H. Berry, Junior, was not entitled to check A-121 for $162.90 listed in Schedule B (R. 3-7). Having his attention directed to this, the Paymaster ordered his administrative board to make an investigation of the activities of James H. Foley, a civil service clerk, CAF-4 (R. 4). Upon learning this, Foley went to New York where he killed himself on November 22, 1938 (R. 10).

Within fifteen days after the investigation was ordered, *and from evidence in the Paymaster's files* (R. 16), the administrative board found that no money was owing the payees, that no payee ever saw, endorsed or received the checks, that the checks were supported by "travel or mileage orders which Foley forged," and that Foley had presented the checks to the disbursing officers "who signed them without verifying the vouchers and documents which supported them" (R. 10). This was in violation of an Act of Congress, 31 U. S. C. A., s.82. See Opinions of Comptroller of Treasury, Vol. 20, p.859.

The investigation also revealed that Foley had fraudulently procured the checks to be validated and issued, and upon gaining their possession he forged the professed payees' names, endorsed them himself, and then cashed or deposited them to his credit at The Anacostia Bank where he had maintained an account for twelve years (R. 11-15).

Whereupon the Secretary of the Navy convened a Board of Inquiry for the purpose of "inquiring into the circumstances and the general activities of James H. Foley

who defrauded the United States of $18,060.83 and the circumstances which made the execution of such fraud possible" (R. 10). The findings of the Board have not been made public (R. 11).

The following pleaded facts stand admitted by the Government:

(a) "* * * that plaintiff owes the public the duty to issue only legitimate checks to legitimate creditors of the Government and that if it issues fictitious checks, warranting them to be genuine, equity and fair play require that it should bear the loss." (R. 14)

(b) "* * * the administrative section of the United States Marine Corps * * * was specifically charged with the duty of preauditing, examining and checking all accounts and claims against the United States arising in the Marine Corps." (R. 15).

(c) "Owing to the confidence reposed in Foley by the * * * administrative section of the Marine Corps, and owing to their neglect of duty in failing to check or supervise his work, Foley, on 144 occasions between July 1936 and November 1938 successfully defrauded the United States by obtaining money unlawfully." (R. 14)

(d) "The disbursing officers and paymasters who signed and validated the checks were specifically charged by law with the duty, before disbursing public funds, of ascertaining whether the United States actually was indebted to the payees of the checks in the amount called for and the object typed thereon. But the disbursing officers and paymasters neglected their duty in this regard." (R. 16)

(e) "Foley's fraud was not detected earlier because no supervision was exercised over his work and no preaudit or postaudit of the documents and vouchers supporting the checks was made, though if made the fraud or deceit would have been instantly exposed, as it was

two years afterwards when the records and accounts were examined and audited." (R. 21)

(f) "Plaintiff knew from its record and accounts, if they had been examined beforehand, that it was not indebted to the payees of the checks in the amount or for the object typed thereon or for any other object." (R. 16)

(g) "The Anacostia Bank, which had cashed the checks for Foley, endorsed each check and transmitted it to the defendant for collection to its account." (R. 11)

(h) "Relying upon the plaintiff's aforesaid warranty of their genuineness, and believing that they bore the genuine signatures of the payees, defendant, as the checks were received by it from The Anacostia Bank, placed the following printed endorsement on the back of each check: 'Pay to the order of any Bank, Banker or Trust Co. Prior endorsements guaranteed. National Metropolitan Bank, Washington, D. C.' " (R. 12)

(i) "Relying upon the plaintiff's warranty of the genuineness of the checks and believing them to bear the genuine signatures of the endorsers, and in ignorance of their forgery and of their being bogus in their inception, defendant, as each check was received by it for collection, as aforesaid, presented it to the Treasurer of the United States for payment and redemption and upon collecting the proceeds placed the same upon its books to the credit of The Anacostia Bank, Anacostia, D. C.—the cashing Bank—and thereafter, in the regular course of business, and before discovery of the forgeries, defendant paid over the proceeds of said checks to said Anacostia Bank. Defendant never received nor did it exact any compensation or profit for its services in that behalf and throughout its dealings with the plaintiff in connection with said checks it acted in the utmost good faith." (R. 13)

(j) "No bad faith or negligence, traceable to defendant

—the collecting Bank—contributed to the payment of the checks or their forgery." (R. 18)

(k) "The forgery of the checks deprived nobody of title, as would be the case if the checks had been genuine and normal." (R. 18)

(l) "The checks were not owned by anybody, i. e. nobody had title to any of them." (R. 18)

(m) The United States "invited and facilitated the forgeries." (R. 18)

(n) "Defendant says that the initial misrepresentation of the Government that these checks were genuine in all respects lulled it into a sense of false security; that if the representations of the Government to the public that the checks were genuine in all respects had been true, the checks would have reached the payees' hands in the regular course of business and there would have been no forgeries and no loss." (R. 19)

On August 11, 1942 the present action was filed (R. 1). But the filing date was six years after the first check was paid by the Treasury and nearly four years after the discovery of the falsity of the checks and the forgeries. The complaint charges no negligence or bad faith against petitioner. Petitioner filed comprehensive answers (R. 8-22) and demanded trial by jury (R. 20).

On March 22, 1943 the Government moved for summary judgment on the pleadings (R. 22). The motion was predicated on *Washington Loan & Trust Co.* v. *United States*, 77 U. S. App. D. C. 284, 134 F. (2d) 59. On June 9, 1943 the District Court, without making any findings of fact, conclusions of law, or announcing any opinion, entered judgment (R. 23) against petitioner for $18,060.83 with 6 per cent interest (about $4,000.) from the filing date, though interest was asked on each check from the date

of payment. (See *Sanborn* v. *United States*, 135 U. S. 271, 281). On May 1, 1944, upon appeal by petitioner (R. 25), the United States Court of Appeals for the District of Columbia affirmed the judgment of the District Court (R. 34) pursuant to its opinion (R. 30-33).

JURISDICTION

This Court has jurisdiction to issue the writ applied for under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, at p. 938. The United States Court of Appeals for the District of Columbia had jurisdiction under Sec. 26, Title 18, 1929 D. C. Code, and the District Court had jurisdiction under Sec. 44 of the same Title.

QUESTIONS PRESENTED

1. Where false and fraudulent checks, issued by the United States as *genuine* ones, fall into the hands of an intermediate bank bearing forged payees' endorsements, is that bank liable for the inevitable resulting loss because it warranted the genuineness of the endorsement in reliance upon the avowed integrity of the checks, and in the belief that they had a rightful owner who had endorsed; it appearing that the intermediate bank upon collecting the checks forwarded the proceeds to the cashing bank in ignorance of their falsity and before discovery of the forgeries, that it acted in good faith, was not enriched, was not negligent and never dealt with the forger?

2. Assuming the foregoing facts, is not the United States, estopped generally, and particularly under the Uniform Negotiable Instrument Law, 1940 D. C. Code, Vol. 2, s.28-124, to set up the forgeries?

3. Assuming the foregoing facts, is not the United States barred by laches where it delays filing of suit against the collecting bank until after that bank has lost, by limitations, all right of recourse against the cashing bank, its prior endorser?

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

1. The United States Court of Appeals for the District of Columbia has decided a federal question of general importance which has not been but should be settled by this Court.

2. The decision of the United States Court of Appeals for the District of Columbia is in conflict with an applicable decision of this Court, namely, *United States* v. *Chase National Bank*, 252 U. S. 485.

3. The decision of the United States Court of Appeals for the District of Columbia is in conflict with two applicable decisions of Courts of coordinate jurisdiction, namely, *United States* v. *First National Bank of Chicago*, 138 F. (2d) 681, decided by the Seventh Circuit, and *Ladd & Tilton Bank* v. *United States*, 30 F. (2d) 334, decided by the Ninth Circuit.

4. The United States Court of Appeals for the District of Columbia has decided a question of general importance contrary to established federal law in that it wholly ignores the doctrine of equitable estoppel and laches, the negligence of the Government and the innocence of petitioner.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 8562,

National Metropolitan Bank, appellant, v. *United States of America, appellee,* and that your petitioner may have such other and further relief in the premises as to this Court may seem meet and just.

GEORGE C. GERTMAN,
American Security Building,
Washington, D. C.

Attorney for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1944

No.....

NATIONAL METROPOLITAN BANK, a corporation,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

1. The position of the United States in this case is identical with its position in *United States* v. *Chase National Bank*, 252 U. S. 485. There the Government attempted to throw its loss, incurred through the issuance of a single false and fraudulent Treasury check, on the Chase Bank because that bank turned the check in at the Treasury bearing a false payee's endorsement which it impliedly warranted as genuine; the Government's theory being that the Chase Bank got no title to the check owing to the forged endorsement, gave no consideration for the payment and breached its warranty. Here, the same thing is attempted

regarding loss on 144 false checks. In the Chase Bank case the facts are identical with the facts in the present case in the following respects:

The check was false and fraudulent and it had no rightful owner to whom liability on it remained, though upon its face it was normal and carried the Government's affirmation that it was genuine and legitimate.

The check was given full faith and credit by the Chase Bank and the Treasurer of the United States.

The payment liquidated the Government's obligation which the check created.

The forger of the endorsement had free access to blank Government checks, thus the Government made available to him the means with which to invite and facilitate the forgery. Crime and forgery antedated the forgery of the ostensible payee's name.

The same Government clerk who wrote the check forged the payee's endorsement and cashed it.

The check itself being false, the forged endorsement and consequent loss was therefore inevitable.

The check was not restrictively endorsed by the Chase Bank. The check found its way into the hands of an innocent collecting bank bearing forged endorsement of the ostensible payee.

The innocent intermediate or collecting bank impliedly warranted the genuineness of the false endorsement; here it expressly did this.

The innocent collecting bank got no title to the check *except through estoppel.*

Nobody had a better title to the check than the innocent collecting bank.

The Government did not have to pay the check twice.

The intermediate bank collected the check and paid out the proceeds in ignorance of its invalidity and the forged endorsement. It was not enriched in any way.

Deciding the issue, which was: On whose side did equity lie, the Government's or the bank's, this Court held: "In order to recover, plaintiff must show that the defendant cannot retain the money with good conscience. Both are innocent of intentional fault. He cannot be called upon to pay again, and the collecting bank has not received the proceeds of an instrument to which another had a better title. The equities of the drawee who has paid are not superior to those of the innocent collecting bank."

And in *United States* v. *First National Bank of Chicago*, 138 F. (2d) 681, it appeared that the United States, owing to its "culpable" negligence, issued 22 checks to the order of persons who were dead. Bearing forged endorsements of the names of the dead payees, the checks reached the hands of the First National Bank of Chicago for collection —though they were not so restrictively endorsed,—for the accounts of the forwarding banks which had cashed them for the forger. The Government's action against the collecting bank was based upon its "express warranty" of the genuineness of the forged endorsements. It was shown that the bank, upon collecting the checks, credited the proceeds to the various forwarding banks, that it was not benefitted in any way and that it was free of negligence. In affirming the judgment of the District Court, the Circuit Court of Appeals unanimously held: "Equitable consideration also dictate that judgment in this case should be for the defendant. Defendant was in no way benefitted by collecting these checks. It retained no part of the proceeds collected from the plaintiff." The Government "having set in motion the machinery which resulted in the loss, it may not now recover from the defendant thereon."

(Cf. also the recent case of *County of Oneida* v. *First*

Citizens Bank, 35 N. Y. Supp. (2d) 785, where the Appellate Division of the Supreme Court of New York said: "There is no suggestion in the papers that the defendant enriched itself in any degree by cashing the warrants in suit.")

Instead of following these two applicable federal decisions, supra, the United States Court of Appeals for the District of Columbia relied on *Clearfield Trust Co.* v. *United States*, 318 U. S. 363-8, and *Washington Loan & Trust Co.* v. *United States*, 77 U. S. App. D. C. 284, 134 F. (2d) 59, as precedents for the proposition and ruling that when petitioner—

> "* * * presented the [false and fraudulent] checks for payment with a warranty, express or implied, that the endorsements were in all respects regular, it thereby made itself liable to the drawer or drawee if it afterwards was shown that they were forged." (R. 32)

But the Clearfield Trust Company case did not concern a false and fradulent Government check. That case does not fit this case because there the check was *genuine* and valid and was issued conformably to statutory law in payment of a legitimate obligation, it had a rightful owner to whom liability remained and who could lawfully endorse, it was abstracted from the mail without any fault of the Government, and there was no negligence on the part of the Government. Consequently all the equities were on the Government's side. And, furthermore, the decision in the Clearfield Trust Company case was entirely consonant with what this Court held in the Chase Bank case, ante, namely: "If the draft had been a valid instrument with good title thereto in some other than the collecting bank, nothing else appearing, the drawee might recover as for money paid by mistake."

And also wholly inapplicable to the facts and defenses in this case is *Washington Loan & Trust Company* v. *United States*, 77 U. S. App. D. C. 284, 134 F. (2d) 59, though it involved forged endorsements of false Government checks. But in that case the Trust Company could not effectively plead equitable estoppel because it had dealt with the forger by cashing for him over 700 of the checks and therefore it was guilty of negligence contributing to the success of the forgeries. Unlike here, the Trust Company's position was not changed in reliance upon payment because it kept the money it collected from the Government. Unlike here, the Trust Company was put in no worse position after returning the money to the Government than if the Government had originally refused to pay the checks. Unlike here, the Trust Company was enriched through collecting the checks because if the Government had not paid them it would have been out of pocket the money it had paid the forger. Unlike here, the Trust Company acted for itself as owner and not for the convenience of another bank.

And there is nothing in *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, which militates against petitioner's position because the litigation in that case, unlike here, was against the bank that cashed the checks for the forger. In this respect that case is identical with *Washington Loan & Trust Co.* v. *United States*, *supra*. The Providence Bank having dealt with the forger, there were no equities on its side like the ones on the side of the Chase Bank. (It is noteworthy that Justice White who wrote the Providence Bank decision, was Chief Justice of this Court at the time the Chase Bank case was decided.)

The drawee's right to recover money paid on a *genuine* check bearing a forged payee's endorsement, warranted as genuine, is not absolute. The right to recover depends upon the facts and circumstances of each case, and equitable estoppel and laches pervade the right. District of Columbia Code (1940), Vol. 2, s.28-124; *Clearfield Trust*

Co. v. *United States*, 318 U. S. 363; *Ladd & Tilton Bank* v. *United States*, 30 F. (2d) 334, at p.337; *United States* v. *Guaranty Trust Co.*, 293 U. S. 340; *United States* v. *First National Bank of Chicago*, 138 F. (2d) 681; Keener on Quasi Contracts (1893), p.67. *State Planters Bank & Trust Co.* v. *Fifth-Third Union Trust Co.*, 56 Ohio App. 309, 10 N. E. (2d) 935. *Cf. Holly* v. *Missionary Society*, 180 U. S. 284; *Eliason* v. *Wilborn*, 281 U. S. 457, at p.461.

2. Equitable Estoppel, according to Professor Pomeroy, rests upon the principle: "When one of two innocent persons—that is, persons each guiltless of an intentional, moral wrong—must suffer a loss, it must be borne by that one of them who by his conduct—acts or omissions—has rendered the injury possible." Pomeroy's Equity Jurisprudence (1905), Vol. 2, s.804, p.1421.

Measured by Professor Pomeroy's definition, it cannot be controverted that the acts and omissions of the Government rendered the loss possible when, through culpable negligence, it permitted 144 fictitious checks to masquerade in commercial channels as its genuine checks, each thereby winning the faith and credit of an unsuspecting public. *Cf. Leather Mfgrs. Bank* v. *Morgan*, 117 U. S. 96. Also *Central National Bank* v. *National Metropolitan Bank*, 31 App. D. C. 391.

3. Regarding the third question presented, namely, laches, it cannot be successfully controverted that the Government's unexplained delay in filing suit was prejudicial to petitioner since the delay has deprived petitioner of an effective remedy over, in case of recovery, against The Anacostia Bank owing to the statute of limitations running in favor of that bank on each check as it received the proceeds. *Leather Mfgrs. Bank* v. *Merchants Bank*, 128 U. S. 26; *Philadelphia National Bank* v. *Fulton National Bank*, 25 F. (2d) 995; D. C. Code, (1940), Vol. 2, s.28-201; *United States* v. *Bank of America*, 47 Supp. 279, 281. In *Ladd & Tilton Bank* v. *United States*, 30 F. (2d) 334, the Ninth Circuit Court of Appeals, at p.337, said: "It

would be a harsh rule and wholly devoid of equity and good conscience which would provide that one paying a forged instrument, after discovering the forgery, might nevertheless complacently rely on an implied warranty for the full period of the statute of limitations and then recover from one who also innocently relied on the validity of the endorsement, and who, *by delay in the bringing of the action* or giving notice, has lost all means of protecting himself from those primarily liable. As the statute of limitations does not run against the Government, its delay could be indefinite. Such a rule ought not to be and is not the law." (Italics supplied)

In *Clearfield Trust Co.* v. *United States*, *ante*, this Court held that lack of prompt notice of the forgery would be a defense in an action against a collecting bank if the latter showed that delay caused him damage. The Court found no such damage in the case before it since the collecting bank, so far as appeared, could still recover from the prior endorser. In contrast, the Government here, by delaying its suit until after the statute had run against petitioner, has damaged petitioner by completely cutting off its right of recovery against a responsible prior endorser, The Anacostia Bank. If petitioner is not required to bear a loss flowing from lack of prompt notice, the giving of which is not a condition precedent to suit (*Leather Mfgrs. Bank* v. *Merchants Bank*, 128 U. S. 26, *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302) a fortiori, it is required to bear a loss flowing from lack of prompt suit.

Nor can it be argued that petitioner should have paid the Government's demand in December 1938 and proceeded against The Anacostia Bank. Had it done so it would have run the risk of being denied recovery against The Anacostia Bank—as was the case in *Central National Bank* v. *National Metropolitan Bank*, 31 App. D. C. 391—on the ground that the Government was not entitled to restitution

since petitioner had only such right against The Anacostia Bank as the Government had against it. "It is true that [the drawer] was not a party to the action, but the plaintiff, [drawee] having recognized his right to the return of the money, * * * has taken his place, and is bound by whatever would bind him had it refused his demand for repayment and the action had been by him against it to recover money paid under a forged endorsement of his check." Again: "* * * there is no cause of action unless the payment of the check was not, as against the drawer, a good payment." *Central National Bank* v. *National Metropolitan Bank*, 31 App. D. C., at p.396. *Cf. National Bank* v. *Seattle National Bank*, 109 Wash. 312, 187 P. 342.

4. Petitioner has limited this brief primarily to a discussion of the conflict between the decision of the United States Court of Appeals for the District of Columbia and the decisions of this Court and Courts of coordinate jurisdiction. There is, however, attached hereto an appendix containing a general discussion of the case and the law applicable thereto for the information of the Court.

Respectfully submitted,

GEORGE C. GERTMAN,
American Security Building
Attorney for Petitioner.

APPENDIX

1. Because public funds cannot be expended except in compliance with law, U. S. C. A., Vol. 31, s.492, checks of the Government backed by the integrity of the United States circulate virtually on the basis of currency. They inherently carry the Government's affirmation of their verity, i. e. that they are in all respects what they purport to be—checks issued the payees in payment of the antecedent obligations stated on their face—and will be paid upon presentment at the Treasury. "It is the settled general law that all necessary prerequisites to the validity of official action are presumed to have been complied with." *Lewis* v. *United States*, 279 U. S. at p.73. Petitioner relied upon this presumption and upon nothing else when it handled these checks.

The only risk that attends a normal *genuine* check of the United States is the chance of its being lost, stolen or abstracted from the mail and falling into a forger's hands. Such was the case in *Clearfield Trust Co.* v. *United States*, 318 U. S. 363. Consequently the burden which banks assume is negligible when the checks have a true and legitimate status. But the checks involved in this case have no such status and their forgery was therefore inevitable as a check fraudulently obtained will be fraudulently used. The fact that the checks were not willfully issued is immaterial. *Continental National Bank* v. *National Bank of Commonwealth*, 50 N. Y. 575, at p.583; *Leather Mfrs. Bank* v. *Morgan*, 117 U. S. 96.

According to the facts in this case the Government so conducted its business that crime and injury would necessarily follow in its wake. A system had been installed in the Paymaster's office to prevent the very loss that happened. The wrongdoing of Foley was accomplished not by the working of the system but by the failure of the Government to observe its requirements. *Cf. International*

Finance Corp. v. *Peoples Bank*, 27 F. (2d) 523 affirmed in 30 F. (2d) 46; *Erickson* v. *Iowa National Bank*, 211 Iowa 495, 230 N. W. 342.

2. This action was brought by the United States to recover money allegedly paid the defendant under mistake of fact (R. 1). Payment grew out of the Government's redemption of 144 checks which it had issued and affirmed as *genuine* and valid but which turned out to be false and fraudulent. Being an action for "money had and received," it is ruled by equitable principles and "the claimant to prevail must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it." *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, at p.309. And, "since in this type of action, the plaintiff must recover by virtue of a right measured by equitable standards, it follows that it is open to the defendant to show any state of facts which, according to those standards, would deny the right." *Stone* v. *White*, 301 U. S. 532, at p.535. These principles are inculcated in the decision of this Court in *United States* v. *Chase National Bank*, 252 U. S. 485, which, was an action to recover money paid to an innocent collecting bank that had "impliedly" warranted the genuineness of a forged payee's endorsement upon a false and fraudulent Government check. There, at p.495, the Court said: "In order to recover plaintiff must show that the defendant cannot retain the money with good conscience." The same principle was very recently applied by the Seventh Circuit in *United States* v. *First National Bank of Chicago*, 138 F. (2d) 681, which was an action by the United States against the bank upon its "express" warranty of the genuineness of forged payees' endorsements on 22 Government checks payable to the order of dead people and negligently issued. There, at p.686, the Court said: "Equitable considerations also dictate that judgment in this case should be for the defendant. Defendant was in

no way benefitted by cashing these checks. It retained no part of the proceeds collected from the plaintiff."

In this case the Government, though also predicating a right of recovery (see second count, R. 2) on an "express" warranty of the genuineness of the forged payees' endorsements (R. 2), is relegated for recovery, if at all, under the first count (R. 1) "for money had and received" because this Court ruled in *United States* v. *Guaranty Trust Co.*, 293 U. S. 340, at p.369, that "the express guarantee of prior endorsements means no more than what is implied by every unrestricted endorsement, namely, that the endorsements were effective to give to the holder a legal title and right to enforce payment of the check."

3. It is undoubtedly the settled federal law that the United States, *in the absence of equitable estoppel and laches*, may recover back money it paid to redeem its own *genuine or legitimate checks* which are turned in at the Treasury bearing forged payees' endorsements, regardless of the good faith and innocence of the collecting bank. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363. This is supported on the ground that the drawee remains liable to the true owner on the genuine checks or for conversion. Harvard Law Rev., Vol. 51, p.304. In such case, unless recovery is allowed, the United States would pay twice.

It is also the established law in the District of Columbia that the United States may recover back money it paid to redeem its own false and fraudulent checks which are turned in at the Treasury bearing forged payees' endorsements, warranted as genuine, where it appeared that the bank which turned in the checks *cashed them for the forger*. *Washington Loan & Trust Co.* v. *United States*, 77 U. S. App. D. C. 284, 134 F. (2d) 59. This is supported on the ground, *inter alia*, that owing to the bank's own negligence in dealing with the forger and cashing the checks for him, it contributed to the success of his forgeries and is there-

fore not in a position to set up equitable estoppel or laches against the United States.

But it is undoubtedly equally established federal law that the United States *may not* recover back money it paid to redeem its own false and fraudulent checks, turned in at the Treasury bearing forged payees' endorsements warranted as genuine, where the bank which turned them in did not deal with the forger, acted as an innocent collecting agency for another, was free of negligence attributable to the success of the forgery, was not benefitted in any way, *and none had a better legal title than the innocent collecting bank.* *United States* v. *Chase National Bank*, 252 U. S. 485; *United States* v. *First National Bank of Chicago*, 138 F. (2d) 581. This is supported on the ground, *inter alia*, that the collecting bank has not received the proceeds of a check to which another held a better title, the falsity of the checks equitably estops the Government from setting up the forgeries, the equities of the United States are not superior to those of the innocent collecting bank, and the bank was not enriched.

Here the Government admits that the checks were false and deceptive, issued in contravention of statutory law, incapable of true endorsement, carried the Government's affirmation that they were in all respects what they purported to be, and that petitioner was innocent throughout, free of negligence attributable to the success of the forgeries, and was not benefitted in any way.

Judge Lowell, the District Judge who wrote the decision in the Providence Bank case, *supra*, reported in 141 F. 209, (affirmed in 214 U. S. 302), correctly stated the federal rule applicable to recovery of money paid on *genuine* checks bearing forged endorsements, when he said: "One who has paid money to another upon a check bearing a forged endorsement may ordinarily recover back the money paid, even though the other be an innocent holder of the check

for value. As a general proposition, this is not disputed. *But recovery cannot be had where it would be inequitable* * * *." Continuing, the Judge said: "Payment by mistake is the basis of plaintiff's recovery. The right based on mistake is effective *unless the plaintiff is estopped to assert it.*" (Italics supplied) *Cf. United States* v. *National Rockland Bank*, 35 F. Supp. 912.

4. Equitable estoppel has never failed a defendant as a defense in this Court in kindred cases. Indeed it is a fact that throughout its history this Court has never imposed liability upon a bank which was free of negligence and had innocently collected and remitted money on spurious or raised Government checks. *Cooke & Co.* v. *United States*, 91 U. S. 389, involved spurious commercial paper of the United States. Mr. Justice Clifford, in dissenting, said: "I am of the opinion that the United States is not liable for its paper promises fraudulently or surreptitiously put into circulation even if the fraudulent act was perpetrated by Treasury officers." But in deciding the case, this Court said: "In this department the Secretary of the Treasury represents the Government. His acts and his omissions, within the line of his official duties, are the acts and omissions of the Government itself; and in all commercial transactions his official neglect will be deemed to be the neglect of the Government." Continuing: "Generally, in respect to all the commercial business of the Government, if an officer specially charged with the performance of any duty and authorized to represent the Government in that behalf, neglects that duty, and loss ensues, the Government must bear the consequences of his neglect. * * * As the Government can only act through its officers it may select for its work whomsoever it will; but it must have some representative authorized to act in all the emergencies of its commercial transactions. If it fails in this, it fails in the performance of its own duties, and must be charged

with the consequences that follow such omissions in the commercial world."

The case of *United States* v. *National Exchange Bank of Baltimore*, 1 F. (2d) 888 (affirmed 270 U. S. 527—ex-President Taft was then Chief Justice), involved a Government check which had been raised from $47.50 to $4750.00. There, there was no negligence attributable to the United States. Yet in the course of his decision Circuit Judge Rose said: "* * * The plaintiff having been both drawer and drawee of the check, may not, in the absence of special circumstances not here existing, recover back the money it has paid to a holder for value not chargeable with neglect or bad faith." Citing *Bank of United States* v. *Bank of Georgia*, 10 Wheat. 333. Continuing: "It is nothing to the point that one who pays his *genuine* check, upon which there has been forged the endorsement of a payee or of some intermediate holder in due course, may, *in the absence of negligence or estoppel*, compel repayment by him to whom paid no matter how innocent of carelessness or wrongdoing the recipient may have been." (Italics supplied)

The federal rule announced by Judge Lowell, *ante*, is incorporated in the District of Columbia Code (1940), Vol. 2, s. 28-201. It provides that no *title* can be acquired through a forgery "unless the party against whom it is sought to enforce such right is precluded from setting up the forgery." The effect of this statute is that a forged endorsement "is operative" against a party who "is precluded from asserting the forgery." This effect was given the statute by this Court in *United States* v. *Guaranty Trust Co.*, 293 U. S. 340, 349. *See Public Bank of New York* v. *Burchard*, 135 Minn. 171, 160 N. W. 667. *United States* v. *Citizens Union National Bank*, 40 F. Supp. 609, 610. *United States* v. *National Exchange Bank*, 45 F. 163. *Wells Fargo & Co.* v. *United States*, 45 F. 337.

If the checks had been genuine in their origin, the Government's remedy would rest on District of Columbia Code

(1940), Vol. 2, s.28-124, and the common law action of assumpsit for "money had and received." *State Planters Bank & Trust Co.* v. *Fifth-Third Union Trust Co.*, 56 Ohio App. 309, 10 N. E. (2d) 935.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 161

NATIONAL METROPOLITAN BANK, A CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

BRIEF OF PETITIONER

GEORGE C. GERTMAN,
American Security Building,
Washington, D. C.

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I

The Opinions of the Courts Below

The judgment of the District Court of the United States for the District of Columbia (R. 19) was entered without an opinion.

The opinion of the United States Court of Appeals for the District of Columbia, affirming the judgment of the District Court, was reported in 142 F. (2) 474, and is a part of the record (R. 25-29).

II

Jurisdiction

The jurisdiction of this Court is invoked by reason of its jurisdiction to review decisions of the United States Court

of Appeals for the District of Columbia under Title 28, U. S. C. A., s. 347 (Judicial Code, s. 240, amended).

III

Statement of the Case

Between July 13, 1936, and November 16, 1938—2⅓ years—the Paymasters of the United States Marine Corps, Washington, D. C., issued 144 Treasury checks totalling $18,060.83 drawn payable to the order of sixteen marine officers, as follows:

8 to Lieutenant Colonel C. B. Cates
15 to Captain C. R. Wallace
23 to Captain H. M. Peter
22 to Major B. Dubel
12 to Lieutenant Colonel F. A. Hart
33 to Captain E. W. Snedecker
7 to Lieutenant Colonel W. W. Ashurst
9 to Major R. H. Pepper
1 to Captain T. B. Jordan
1 to Captain A. J. Cincotta
2 to Captain J. H. Berry, Junior
2 to Captain H. S. Wheeler
3 to Captain V. W. Worledge
3 to First Lieutenant James A. Hennesy
1 to Captain F. C. Donald
2 to First Lieutenant G. A. Brace

Most of these officers were attached to the Marine Corps Headquarters, Washington, D. C.

In validating and issuing them, the Paymasters believed that the checks were in payment of legitimate debts owing the payees for the object stated on them, but in November 1938, they learned that they were issued in payment of forged and fictitious claims fabricated by James H. Foley,

a civilian clerk in the Paymasters' Department. As a result of this, the Government had sustained a loss of $18,060.83.

As the checks were conceived in fraud and therefore fraudulently issued, it followed as a corollary that they would bear false endorsements since checks fraudulently obtained are always fraudulently used.

To recoup this loss, the Government, four years afterwards, filed the present suit on the theory that since petitioner had stamped the checks, "Pay to the order of any Bank, Banker or Trust Co. Prior endorsements guaranteed," it should make good what the Government had lost.

Petitioner admitted receiving the money but denied responsibility for the loss on the ground that it had acted throughout upon its faith in the integrity of the checks and in the belief that they were in all respects what they imported, namely, checks issued the payees in payment of the debts owing them as recited on their face. Petitioner also stated that it had been innocently drawn into the transactions, that it acted throughout the years in good faith, that it paid out the money as it was received, that it was not enriched in any way, that it never cashed the checks for the forger, and that since the checks were fraudulent and duplicitas, the loss should remain where it fell (R. 8-18).

On March 22, 1943, the Government filed a motion for judgment on the pleadings (R. 19). On June 9, 1943, the District Court granted the motion and entered judgment against petitioner for $18,060.83, with interest from August 11, 1942 (R. 19-20).

On June 15, 1943, petitioner noted an appeal from the judgment to the United States Court of Appeals for the District of Columbia (R. 20) and superseded the judgment by depositing $22,000.00 in the Registry of the Court (R. 20). Petitioner filed a statement of the points on which it relied on its appeal (R. 21-23).

On May 1, 1944, the United States Court of Appeals for the District of Columbia rendered its opinion (R. 25-29) and affirmed the judgment of the District Court (R. 30).

On June 14, 1944, petitioner filed in this Court a petition for writ of certiorari which was granted on October 9, 1944 (R. 31).

IV

Specifications of Error

The United States Court of Appeals for the District of Columbia erred—

1. In affirming the judgment of the District Court.

2. In failing to rule that petitioner's innocence of wrong, freedom from negligence, absence of unjust enrichment, and its good faith throughout the years, constituted a complete defense to recovery.

3. In failing to rule that the United States was precluded from setting up the forged endorsements as the basis of recovery.

4. In failing to differentiate between valid Government checks issued conformably to law and false Government checks issued in contravention of law.

5. In ruling that when petitioner presented the false checks for payment with a warranty, express or implied, that the payees' endorsements were regular in all respects, it thereby made itself liable to the drawer or drawee if it afterward was shown that they were forged.

6. In ruling that the right of recovery is absolute and therefore equitable considerations are irrelevant.

7. In ruling that petitioner, as holder, was under a statutory duty to determine the genuineness of the payees' endorsements and that it acted at its peril.

8. In ruling that the petitioner's guaranty added something additional to its quasi contractual obligation to return the money if it were found against equity and good conscience to keep it.

9. In failing to rule that the Government was under a duty to make such examination of its records and files, as was made in November 1938, as would timely detect the fraudulent issuance of the first check and thereby prevent the issuance of a succession of checks in violation of law.

10. In failing to rule that no valid contract, quasi or otherwise, available to the Government as drawer-drawee, can be founded on false Government checks.

V

Summary of Argument

1. The action is founded on the assumption that the checks were valid, i. e., issued conformably to statutory law, but it stands admitted that they were false, i. e., issued in contravention of statutory law.

2. Petitioner stands before the Court free of wrongdoing, free of negligence and free of unjust enrichment.

3. The action is ruled throughout by equitable considerations and since it has not been shown that petitioner cannot retain the money with good conscience, there can be no recovery. *United States* v. *Chase National Bank*, 252 U. S. 485; *United States* v. *First National Bank of Chicago*, 138 F. (2) 681; Keener (1935) on Quasi Contracts, pp. 43, 67.

4. The Government being at fault in issuing checks in contravention of law, the equities of the Government are not superior to those of petitioner. *United States* v. *Chase National Bank*, *supra*.

5. The checks being false and therefore not susceptible of valid endorsements, the endorsements are of the same sufficiency in law as they would be if all were genuine. *United States* v. *Guaranty Trust Company*, 60 F. (2) 799, 802.

6. The admitted facts set up in the answer preclude the Government from asserting the forged endorsements as a basis of recovery. 28 D. C. Code (1940), s. 124.

7. Though the distinction is well recognized, the United States Court of Appeals for the District of Columbia did not distinguish between obligations of an endorser arising out of the payment of valid Government checks and those arising out of the payment of false Government checks. *United States* v. *Chase National Bank*, *supra*; *United States* v. *Chase National Bank*, 241 F. 535, 538.

8. Loss on a valid Government check springs from the forged endorsement while loss on a false Government check springs from its issuance. One is real, the other counterfeit.

9. It is no longer on open *Federal* question that a guaranty written above an endorsement on a valid Government check adds nothing to the normal obligation of the endorser who presents the check for payment to the drawer-drawee. *United States* v. *Guaranty Trust Company*, 293 U. S. 340, 349.

10. Even if such guaranty does enlarge the endorser's obligation on a valid Government check, it cannot be availed of by the Government where the check was issued by it in contravention of statutory law. *Tandy* v. *Elmore-Cooper Live Stock Commission Company*, 113 Mo. App. 409, 87 S. W. 614; *Johnson* v. *Hullings*, 103 Pa. 498.

VI

Argument

1. Between July 13, 1936 and November 16, 1938, The Anacostia Bank forwarded to petitioner 144 apparently valid Treasury checks for collection to its account; they having been cashed or deposited at that Bank by James H. Foley, bearing what purported to be the payees' genuine endorsements.

Foley was a civilian clerk, CAF-4, in the Paymaster's Office of the United States Marine Corps, Washington, D. C., whose duties were required to be performed "under general administrative supervision," 5 U. S. C. A., s. 673, p. 275. Compare 20 Decisions of Comptroller of Treasury, 859.

As "it is the settled general rule that all necessary prerequisites to the validity of official action are presumed to have been complied with, * * *," *Lewis* v. *United States*, 279 U. S. 63, 73, petitioner assumed that the checks were valid "as public funds cannot be expended except through the means of a draft or Treasury warrant," 31 U. S. C. A., s. 492.

In appearance the checks were valid as each stated the object for which it was issued as the law required, namely, "pay" or "mileage," and they had typed on them the name and rank of the sixteen payee marine officers to whom, presumably, they had been issued. Most of these marine officers were actually stationed at Marine Corps Headquarters, Washington, D. C., whence the checks originated, and therefore their signatures were always available for comparison. There was nothing suspicious about the checks to suggest that they were not what they imported, i.e., valid Government checks issued conformably to law in

payment of legitimate obligations of the United States. Photostats of the checks are filed in the Clerk's Office.

Government checks differ from private checks in that public funds can be expended only in compliance with statutory law and in banking circles they pass virtually on the basis of currency. Consequently, the normal banking risk which attends a valid Government check is only the chance of its being stolen or lost by the payee, abstracted from the mail, or otherwise fall into a forger's hands. Examples of this are found in *Clearfield Trust Company* v. *United States*, 318 U. S. 363, and *United States* v. *Guaranty Trust Company*, 293 U. S. 340. But inasmuch as false Government checks beget false endorsements, it follows that a Government check unlawfully issued will be unlawfully used. An example of this is found in *United States* v. *Chase National Bank*, 252 U. S. 485.

Upon presenting these apparently valid checks to the Government as drawer-drawee for payment, petitioner stamped them, "Pay to the order of any Bank, Banker or Trust Company. Prior Endorsements guaranteed." Admittedly, this was done *solely* in reliance upon the integrity of the checks, the genuineness of which the Government had inherently warranted, and in the belief that the payees' signatures were true (R. 7).

Petitioner did not keep, but paid over to The Anacostia Bank, the proceeds of each check as collected throughout the 2½ years. It made no charge, was not benefited and stands free of negligence. After the checks had run their course as valid checks and had been redeemed at the Treasury as such, the Government in November 1938 found out that they had been issued in violation of statutory law in payment of fictitious and fraudulent claims, that their recitals were untrue, and, naturally, that the ostensible payees' endorsements were forgeries.

"A fictitious claim against the government is one preferred against it for supplies said to have been furnished to the government or for services said to have been rendered to it, no part of which said supplies or services were in fact supplied or rendered. A fraudulent claim against the government is a false or fictitious claim gotten up or contrived by some person or persons with a design or purpose to deceive or defraud the government." *Bridgeman* v. *United States*, 140 F. 577, 594.

Compare *Bayne* v. *United States*, 93 U. S. 642.

It stands admitted that it was not the false payees' endorsements but the false checks themselves and their false recitals which exposed them; the forgeries could have gone on endlessly unexposed since they affected no rightful payee.

Now, six years after the payment of the first of the 144 checks, and four years after payment of the last, the Government seeks to get back, with interest, the money that it lost through the fraudulency of the checks and which petitioner in misreliance upon the integrity of the checks, collected and remitted to The Anacostia Bank.

In *Walker* v. *United States*, 139 F. 409, 413, it was said:

"The underlying principle of all the decisions is that, when the sovereign comes into court to assert a pecuniary demand against a citizen, the court has authority, and it is under duty, to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject * * * in like subject matter between man and man. The acts or omissions of its officers, if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, and they have acted within the purview of that authority, may in a proper case work an estoppel against the government. The principle that the sovereign is bound by his own acts, and those of his

> lawfully authorized agents within the purview of that authority, is a wholesome one, and requires the courts to visit an estoppel upon the sovereign in a proper case where it invokes judicial action."

And despite the fact that the Government had known since 1938 that the checks were false and contained false recitals, it set them up in the complaint as Simon pure and predicated its right of recovery upon their purity. It is because that predicate is untrue that *Clearfield Trust Company* v. *United States*, ante, is not in point. However, the converse of this ordinarily would be true if the checks had been valid and had lawful payees. This was emphasized by the Court in *United States* v. *Chase National Bank*, ante, thus:

> "If the draft had been a valid instrument, with a good title thereto in some other than the collecting bank, nothing else appearing, the drawee might recover as for money paid under mistake."

But we are dealing here with duplicitas checks, like the one in *United States* v. *Chase National Bank*, ante. Hence:

> "It is nothing to the point that one who pays his genuine check, upon which there has been forged the endorsement of the payee or of some intermediate holder in due course, may in the absence of negligence or estoppel compel repayment by him to whom he paid, no matter how innocent of carelessness or wrongdoing the recipient may have been." *United States* v. *National Exchange Bank of Baltimore*, 1 F. (2) 888, 889, affirmed 270 U. S. 527.

The question presented, therefore, is whether petitioner is morally obligated to refund the money. This involves two factors:

(a) The negligence and guilt of the Government in issuing false checks as genuine ones in contravention of law; and, in contrast,

(b) Petitioner's freedom from negligence, freedom from unjust enrichment, and its complete innocence throughout the years.

Compare *Herrmann* v. *Gleason*, 126 F. (2) 936, 939.

In this connection it will be noted that the 144 checks were not issued by accident and that the Secretary of the Navy realized this in convening a Board of Inquiry which, admittedly, was done for the purpose of "inquiring into the circumstances and the general activities of James H. Foley who defrauded the United States of $18,060.83 and the conditions which made the execution of such fraud possible" (R. 8).

See *Peoples Bank* v. *International Finance Corporation*, 30 F. (2) 46 (certiorari denied, 279 U. S. 858).

Therefore:

> "The principle that forbids the defendant enriching itself at the expense of the plaintiff should clearly forbid the plaintiff indemnifying itself against loss at the expense of an innocent and blameless defendant." Keener (1935) on Quasi Contracts, p. 67.
>
> Compare *Cooke* v. *United States*, 91 U. S. 389.

It cannot be disputed that the checks were issued in contravention of law, nor can it be disputed, for this reason, that they were incapable of true endorsement. It follows, therefore, that when, as here, "the endorsements are of the same sufficiency in law as they would be if all were genuine, the warranty is in accordance with the legal situation * * *." *United States* v. *Guaranty Trust Company*, 69 F. (2) 799, 802.

The Government concedes:

> "* * * If the presenting bank could have obtained a valid title despite the forgeries, there could be no recovery." Government's Brief, p. 17, filed in the Court below.

But in order that an endorsement be effective to give to the holder a legal title, it is not always necessary that it be genuine, for the Negotiable Instruments Law, 28 D. C. Code (1940), s. 124,—*which relates to valid commercial paper*—provides that a forged signature is operative against a party who "is precluded from setting up the forgery." Compare *Public Bank of New York* v. *Burchard*, 135 Minn. 171, 160 N. W. 667.

In *United States* v. *Guaranty Trust Company*, ante, and *United States* v. *Chase National Bank*, ante, the collecting banks were protected against damages although neither could trace title through a valid endorsement.

The checks being false, for which reason the Government cannot be called upon to pay again, it necessarily follows that in exchange for payment, the Government got back the equivalent contemplated by it when it got back, unsullied by the forged endorsements, the false checks it had sponsored.

Keener (1935) on Quasi Contracts, p. 43, says:

> "To entitle the plaintiff, who has paid the money under mistake, to recover the money so paid, he must not only prove that he has paid the money without receiving the equivalent contemplated by him, but he must in addition prove that it is against conscience for the defendant to retain the money so paid."
>
> Compare *The Bank of United States* v. *The Bank of Georgia*, 10 Wheat. 333.

2. In reality, this is an action for money had and received and it is therefore governed by the applicable principles laid down by this Court in the following two cases:

> "A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. The claimant, to prevail, must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted

to retain it. The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession if he has been able to collect it. * * * In such case the simple but comprehensive question is whether the circumstances are such that equitably the defendant should restore to the plaintiff what he has received." *Atl. Coast Line R. R. Co.* v. *State of Florida*, 295 U. S. 301.

"* * * Since in this type of action the plaintiff must recover by virtue of a right measured by equitable standards, it follows that it is open to the defendant to show any state of facts which according to those standards would deny the right." *Stone* v. *White*, 301 U. S. 532.

Recently, in a kindred case, *United States* v. *First National Bank of Chicago*, 138 F. (2) 681, the Seventh Circuit Court of Appeals said:

"Equitable considerations also dictate that judgment in this case should be for the defendant. Defendant was in no way benefitted by collecting these checks. It retained no part of the proceeds collected from the plaintiff."

Indeed the innocence of a defendant has always been a watchword in this Court.

In *United States* v. *Chase National Bank*, ante, the Court said:

"* * * The record discloses substantial evidence to support the finding necessarily involved that no actual negligence or bad faith, attributable to the defendant, contributed to the success of the forgery."

In *United States* v. *National Exchange Bank of Baltimore*, 270 U. S. 527, the Court said:

"* * * The drawer cannot recover for an overpayment to an innocent payee."

In *United States* v. *Guaranty Trust Company*, ante, the Court said:

> "The evidence consisted of an agreement as to the facts and the canceled check. * * * That each of these banks paid a valuable consideration, received the check in good faith, took it without notice of the forgery or other defect, and was not guilty of fraud or negligence * * *."

In the year 1920 the case of *United States* v. *Chase National Bank*, ante, reached this Court for review on appeal by the United States. Since that litigation arose, as here, out of a false Government check, the decision of that case is pertinent. There, as here:

(a) The check was false; it had been issued in contravention of law and its recitals were untrue.

(b) The check had no rightful payee, consequently it was not susceptible of a true endorsement.

(c) The forged endorsement affected no rightful payee.

(d) The forger was the Government's trusted agent.

(e) The forger had access to the Government's blank checks.

(f) Forgery preceded the forgery of the endorsement.

(g) The same hand that wrote the check forged the endorsement.

(h) The Government's agent cashed the check and got the money.

(i) The false check exposed the forged endorsement, and not vice versa.

(j) The check was not deposited in the mail, or lost.

(k) There the Government's negligence was constructive; here it was palpable.

(l) The action was for money had and received; the false endorsement of a false check was the basis of the suit.

(m) The collecting bank never dealt with the forger or cashed the check for him.

(n) The check reached the hands of the collecting bank for collection.

(o) The collecting bank did not keep the money but turned it over before the fraud was discovered.

(p) The collecting bank's position was changed in reliance upon payment.

(q) The collecting bank was innocent, free of negligence, and was not enriched.

(r) In exchange for payment the Government got back its own false check. It did not have to pay twice.

The case involved a single false Government check. The check itself and the professed payee's name were both forged by a Government clerk who cashed it at the Howard National Bank. But in principle there is no difference between a forged Government check "uttered" and a false Government check "issued" in contravention of law as both are iniquitous and duplicitas. In turn, the Chase National Bank, in ignorance of its falsity and the forged endorsement, presented the check at the Treasury for payment. Upon collecting the check the Chase National Bank credited the proceeds to the account of the Howard National Bank.

In deciding the case this Court did not rule that the money should be refunded; instead, after first adverting to the applicability of the doctrine of *Price* v. *Neal*, 2 Burr. 1354, 1357, the Court addressed itself specifically to the legal

aspects of the forged endorsement, and upon this and other phases of the case ruled—

> (a) "The record discloses substantial evidence to support the finding necessarily involved, that no actual negligence or bad faith, attributable to the defendant, contributed to the success of the forgery."
>
> (b) "If the draft had been a valid instrument with a good title thereto in some other than the collecting bank, nothing else appearing, the drawee might recover as for money paid under mistake."
>
> (c) "In order to recover plaintiff must show that defendant cannot retain the money with good conscience."
>
> (d) "Nobody had a better right to it than the collecting bank."
>
> (e) "He cannot be called upon to pay again, and the collecting bank has not received the proceeds of an instrument to which another held a better title."
>
> (f) "The equities of the drawee who has paid are not superior to those of the innocent collecting bank."

3. The United States Court of Appeals for the District of Columbia relied on *Clearfield Trust Company* v. *United States*, 318 U. S. 363-8, for its ruling (R. 28) that—

> "* * * when it presented the checks for payment with a warranty, express or implied, that the endorsements were in all respects regular, it thereby made itself liable to the drawer or drawee if it afterwards was shown that they were forged. Clearfield Trust Co. *v.* U. S., 318 U. S. 363-8."

But the application of that case to this is not justified as there is not the remotest resemblance in the facts. There the Government was free of negligence, the check was issued conformably to law and it had a rightful owner; here the Government was palpably negligent, the checks

were issued in contravention of law, and they had no rightful owners.

The injustice of the ruling of the United States Court of Appeals in the present case lies in the failure of that Court to distinguish between losses arising out of false Government checks unlawfully issued and losses arising out of valid Government checks lawfully issued. This Court recognized such distinction in *United States* v. *Chase National Bank, ante*, when it said—

> "If the draft had been a valid instrument, with a good title thereto in some other than the collecting bank, nothing else appearing, the drawee might recover as for money paid under mistake."

This distinction was also recognized by District Judge Learned Hand, now Associate Justice, Second Circuit, in his opinion in *United States* v. *Chase National Bank*, 241 F. 535, 538, when he said—

> "* * * Now in the case of a genuine bill stolen and forged, the wrong done the drawee, who pays on the forged endorsement, is only that he must pay again, a wrong which cannot arise when the bill is a forgery."
>
> Compare 31 Harvard Law Rev. 304.

Even if the checks had been valid and lawfully issued, a right of recovery would not be absolute but would be governed by equitable considerations. *Clearfield Trust Company* v. *United States, ante; United States* v. *Guaranty Trust Company, ante; United States* v. *First National Bank of Chicago*, 138 F. (2) 681; and *Ladd & Tilton Bank* v. *United States*, 30 F. (2) 334.

4. An express guaranty made to a drawer-drawee at the time of payment of a valid check, bearing the forged endorsement of a bona fide payee, adds nothing to the common law obligation of the presenter of the check, namely, to

refund the money if it was received in such circumstances that offense would be given to equity and good conscience if permitted to keep it. *Leather Mfgs. Bank* v. *Merchants Bank*, 128 U. S. 26. This is no longer an open Federal question as it was directly raised and deliberately decided in 1934 against the Government as drawer-drawee of a valid Government check. *United States* v. *Guarantee Trust Company*, 293 U. S. 340. There the Court said—

> "The express guaranty of prior endorsements means no more than what is implied by every unrestricted endorsement, namely, that the endorsements were effective to give to the holder a legal title and the right to enforce payment of the check."

Compare *State Planters Bank & Trust Company of Richmond* v. *Fifth-Third Union Trust Company*, 56 Ohio App. 309, 10 N. E. (2) 935.

Moreover, a stream cannot rise higher than its source, and since the checks here were issued in contravention of law, the Government cannot stand on any higher ground than the checks themselves. Therefore it is well settled that when the principal obligation is void for illegality, that infirmity will extend to and vitiate the contract of guaranty and will constitute a defense open to the guarantor in an action on the guaranty itself. *Tandy* v. *Elmore-Cooper Live Stock Commission Company*, 113 Mo. App. 409, 87 S. W. 614; *Johnson* v. *Hallings*, 165 Pa. 498.

The converse of this, of course, would be true only where the guaranty ran to a purchaser or endorsee who bought in reliance thereon for value. *Nelson* v. *Hinchman*, 118 F. 435.

5. The cases of *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302; *Onondaga County Savings Bank* v. *United States*, 64 F. 703; *Farmers State Bank* v. *United States*, 62 F. (2) 178; *Fulton National Bank* v. *United States*, 107 F. (2) 86, and *Washington Loan & Trust*

Company v. *United States*, 77 U. S. App. D. C. 284, 134 F. (2) 59, cannot be regarded as precedents for this case because the position of the defendants in those cases was unlike petitioner's enviable position in this case. In each of those cases suit was brought by the Government against the bank that dealt with the forger and cashed checks for him, thereby negligently aiding the forger in the success of his forgeries. In the Washington Loan & Trust Company case the Trust Company cashed over 700 checks for the forger. Besides, in those cases the defendant banks were unjustly enriched at the expense of the Government because the Government's money went to reimburse the money they had paid the forgers. In those cases, therefore, there were no equities on the side of the defendant banks to which they could cling to justify their retention of the money. In contrast, here, petitioner did not deal with the forger, cashed no checks for him, did not keep the money, was an innocent collecting bank, and stands before the Court confident of its rectitude throughout its dealings with the Government. It occupies precisely the position of the Chase National Bank in 252 U. S. 485.

For the reasons stated, it is most deferentially submitted that there are no equities on the side of the Government, and the judgment of the United States Court of Appeals for the District of Columbia should be reversed and the complaint ordered dismissed.

Respectfully submitted,

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No. 161

In the Supreme Court of the United States

OCTOBER TERM, 1944

NATIONAL METROPOLITAN BANK, A CORPORATION,
PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The judgment of the District Court (R. 23–24) was entered without an opinion. The opinion of the Court of Appeals (R. 30–33) is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered May 1, 1944 (R. 34). The petition for a writ of certiorari was filed June 14, 1944. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925.

QUESTIONS PRESENTED

A vouchering officer of the United States during a period of 28 months fraudulently procured the issuance of checks to the order of named payees, forged their signatures as endorsements, and cashed the checks. Petitioner bank endorsed the checks, guaranteeing prior endorsements, and collected and transmitted the proceeds. In an action by the United States to recover from petitioner, the questions presented are:

(1) Whether failure of the United States to prevent or discover the fraud in the issuance of the checks, or the forgeries, bars recovery against petitioner.

(2) Whether the United States, having given petitioner prompt notice of the discovery of the forgery and demanded payment, is barred from recovery because of delay in instituting action.

STATEMENT

On August 11, 1942, the United States instituted suit against petitioner in the District Court of the United States for the District of Columbia, seeking the recovery of $18,060.83, with interest, as a result of the payment of that amount to petitioner upon its endorsement and guarantee of the genuineness of prior endorsements of 144 checks, on which the signatures of the payees had been forged. Petitioner answered (R. 8–20, 21–22) and the United States moved for judg-

ment on the pleadings (R. 22–23). The facts[1] as disclosed by the pleadings are substantially as follows:

James H. Foley, a civilian clerk in the office of the Paymaster, United States Marine Corps, Headquarters, Washington, D. C., was assigned to prepare Marine officers' pay and mileage vouchers, to prepare checks payable to such officers in payment of such vouchers, to present the checks for signature by the Marine Corps paymaster or other disbursing officers duly authorized to draw checks on the Treasurer of the United States, and to deliver the signed checks to the named payees (R. 10, 15–16, 19). From time to time during a period of 28 months beginning shortly before July 13, 1936, and ending November 14, 1938, Foley forged pay and travel mileage vouchers, together with any necessary supporting travel orders, and prepared 144 checks drawn on the Treasurer of the United States in the amounts set forth in the forged vouchers (R. 9–10). The checks and vouchers were payable to each of 16 actually existing Marine Corps officers, many of whom were stationed in Washington, D. C., and none of whom was entitled to the proceeds of any of the checks or had any knowledge of the fraud (R. 10).

[1] The legal conclusions set forth in the answer of petitioner, many of which are reproduced in its petition, pp. 3–5, were, of course, not admitted by the motion for judgment on the pleadings.

Foley took the checks, vouchers, and travel orders he thus prepared and, without their being subjected to any intervening administrative examination, presented them to the Marine Corps paymaster or other authorized disbursing officers who signed them (R. 10, 14–15). The paymaster and disbursing officers were unaware of the fraud and, relying exclusively on Foley's established reputation for honesty and integrity, signed the checks in good faith without verifying the vouchers or supporting documents (R. 10–11). The signed checks, vouchers, and orders were then returned to Foley for filing and distribution (R. 10).

Foley did not deliver the checks to any of the 16 officers named as payees but forged their signatures as endorsements, added his own name as second endorser, and cashed or deposited the checks at the Anacostia Bank of Anacostia, D. C. (R. 10–11). The Anacostia Bank made no investigation of the genuineness of the payees' signatures but took the checks in reliance upon its confidence in its depositor Foley (R. 11). The Anacostia Bank endorsed each check and transmitted it to petitioner, which in turn endorsed each check and presented it to the Treasurer of the United States who paid the amount thereof to petitioner (R. 12–13). The endorsements of both banks on all checks specifically guaranteed prior endorsements (R. 11–12). Petitioner, upon receiving payment of the several amounts, credited

the collections to the Anacostia Bank and then paid the proceeds to the latter Bank. Thereafter, in November 1938, the Government discovered the forgeries and on December 8, 1938, made formal demand upon petitioner for repayment (R. 13), which was refused. Action was brought by the United States on August 11, 1942 (R. 1).

The District Court entered judgment for the United States on its motion for judgment on the pleadings (R. 23–24). On appeal, the United States Court of Appeals for the District of Columbia affirmed, holding that its prior decision in *Washington Loan & Trust Co.* v. *United States*, 134 F. (2d) 59, was controlling (R. 34).

ARGUMENT

We believe that the decision below is clearly correct on both of the questions presented (see p. 2, *supra*). Because, however, of a conflict with the Circuit Court of Appeals for the Seventh Circuit on the question whether the drawer's negligence in issuing a check or in discovering the forgery of the payee's signature will defeat recovery from the collecting bank which guaranteed its genuineness, we do not oppose the grant of a writ of certiorari on that question.

1. The court below held that the drawer of a check is under no duty to a cashing or presenting bank to exercise diligence in the issuance thereof—here, diligence in preventing or discovering fraud;

that neither the drawer nor the drawee is under a duty to a cashing or presenting bank to discover promptly the forgery of the payee's endorsement; and that the presenting bank which warranted the genuineness of such endorsement is liable to the drawee for the payment received (R. 30–33). This ruling follows the earlier decision of the court below in *Washington Loan & Trust Co.* v. *United States*, 134 F. (2d) 59. We believe that it is fully supported by the decisions of this Court in *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, and *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, holding that the United States, as drawee, is entitled to recover payments made under forged endorsements, even though there was unreasonable delay in giving notice after actual discovery of the forgeries, at least where damage to the defendant bank was not shown to have resulted from such delay.

However, the holding of the Circuit Court of Appeals for the Seventh Circuit in *United States* v. *First National Bank of Chicago*, 138 F. (2d) 681, is to the contrary.[2] That court denied recovery

[2] There is no merit in petitioner's contention that the decision below also conflicts with *United States* v. *Chase National Bank*, 252 U. S. 485. The critical fact in that case, not made clear in the petition herein, was that the drawer's signature was forged and the check was payable to the order of the drawer. The forgeries were of both the signatures as drawer and as payee. Both the district court (241 Fed. 535) and the Circuit Court of Appeals for the Second Circuit (250 Fed. 105) denied recovery to the United States against

to the United States against a presenting bank which had specifically guaranteed the genuineness of prior endorsements on 22 pension checks payable to the order of a payee who was in fact dead and whose endorsements had been forged. As to 19 checks, prior endorsers had become insolvent before the forgery was discovered, and the court held that the United States knew or should have known of the forgery and accordingly was chargeable with negligence in failing to give prompt notice thereof to the presenting bank which had lost its recourse against prior endorsers. As to 3 of the checks, the defendant bank still had recourse against prior endorsers, and the court similarly held that the Government's negligence in the issuance of the checks precluded recovery. While no fraud was involved in the issuance of the checks in the *First National Bank of Chicago* case, it is inconsistent with the present case in reasoning and result on the issue of the effect of

---

the collecting bank on the ground that the check, in the circumstances, was payable to bearer. This Court affirmed, applying the rule of *Price* v. *Neal*, 3 Burr. 1354, which holds the drawee chargeable with knowledge of the drawer's signature and hence precluded, after acceptance or payment, from denying the genuineness of the drawer's signature (252 U. S. at 494). This Court thus merely extended the rule of *Price* v. *Neal* to cover a check payable to the order of the drawer, holding that the added forgery of the payee's signature placed the drawee in no better situation than it occupied by virtue of the acceptance of the forged signature of the drawer. There are other points of difference which the Government is prepared to point out if certiorari is granted.

negligence of the drawer-drawee.[3] Resolution of the conflict should remove an element of uncertainty in respect of the rights and obligations of the United States in its commercial paper, which, at the present time, consists of several hundred million checks a year.

2. Petitioner contends that it should have been relieved of liability because it was prejudiced by the Government's delay in instituting suit. We believe that the court below correctly rejected this contention, and we submit that review thereof by this Court is not warranted because the record fails to support petitioner's contention that it was prejudiced. The Government discovered the forgeries between November 21 and December 5, 1938 (R. 9–10), and petitioner promptly received notice thereof and a demand for repayment on December 8, 1938 (R. 8). There was thus no delay in giving notice of the forgery. Petitioner contends, however, that it was prejudiced by the delay of the United States in instituting suit, because, according to petitioner, the statute of limitations has run in favor of the cashing bank, and if the United States recovers from petitioner, the latter fears that it will be unable to recover in

[3] Since the record there disclosed that the disbursing officers and vouchering officers were ignorant of the fact that the payee was dead, the decision in effect held that the United States was under a duty to exercise care and diligence in the discovery of the forgery.

turn from the cashing bank. There is a dual vice in this contention. Petitioner's pleadings alleged that it was never the owner of the checks but in all instances acted as the collection agent for the Anacostia Bank which had cashed them. As an agent, petitioner's repayment to the United States of the amount of the forged checks would create a right to indemnity from its principal for loss sustained by the agent in exercising the principal's directions. Restatement of Agency, Section 439; *Federal Reserve Bank* v. *Atlanta Trust Co.*, 91 F. (2d) 283 (C. C. A. 5), certiorari denied, 302 U. S. 738; cf. *Hidalgo Steel Co.* v. *Moore & McCormack Co.*, 298 Fed. 331, 334 (S. D. N. Y.). But in any event, the statute of limitations runs only against a cause of action. If petitioner had a cause of action against the Anacostia Bank before payment to the United States, it could have pursued it; if it has no cause of action until it pays the United States or until final judgment is entered against it, its claim against the Anacostia Bank obviously would not be barred. Cf. *Guarantee Title & Trust Co.* v. *Viola State Bank*, 124 Kans. 776.[1]

CONCLUSION

For the reasons stated, the United States does not oppose the granting of the writ. It is re-

[1] After receipt of notice of the forgery, it was the duty of petitioner to take appropriate steps to protect itself. Cf. *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296.

spectfully submitted, however, that the writ of certiorari, if granted, should be limited to a review of the first question.

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No. 161

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OCTOBER TERM, 1944

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BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 161

NATIONAL METROPOLITAN BANK, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The judgment of the District Court of the United States for the District of Columbia (R. 19–20) was entered without opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 25–29) is reported in 142 F. (2d) 474.

JURISDICTION

The judgment of the Court of Appeals was entered May 1, 1944 (R. 30). The petition for a writ of certiorari was filed June 14, 1944, and was granted October 9, 1944 (R. 31). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

A vouchering clerk of the United States during a period of 28 months fraudulently procured the issuance of checks to the order of existing payees, purloined the checks, forged the payees' signatures as endorsements, and cashed the checks at a bank which thereafter endorsed and transmitted them to petitioner bank. Petitioner endorsed the checks, explicitly guaranteeing prior endorsements, collected the proceeds from the United States and transmitted them to the cashing bank. The question presented is whether failure of the United States to exercise diligence to prevent or discover the fraud and the forgeries bars recovery from petitioner of the amount thus paid to it.[1]

STATEMENT

On August 11, 1942, the United States instituted suit against petitioner in the District Court of the United States for the District of Columbia, seeking

[1] A second question was raised by the petition for certiorari (p. 6), namely, whether the United States, having given petitioner prompt notice of the discovery of the forgery and having promptly demanded repayment, is nevertheless barred from recovery because of delay in instituting suit. This has apparently been abandoned by petitioner since it is neither specified as an error (Pet. Br. pp. 4–5) nor argued in its brief. In any event, the question lacks merit. *Restatement of Agency*, Section 439; *Federal Reserve Bank* v. *Atlanta Trust Co.*, 91 F. (2d) 283 (C. C. A. 5), certiorari denied, 302 U. S. 738. Cf. *Hidalgo Steel Co.* v. *Moore & McCormack Co.*, 298 Fed. 331, 334 (S. D. N. Y.); *Guarantee Title & Trust Co.* v. *Viola State Bank*, 124 Kans. 776.

to recover $18,060.83, with interest, which the Treasurer of the United States had paid to petitioner upon 144 checks bearing the forged signatures of the payees (R. 1–6). Petitioner answered (R. 6–17, 17–18) and the United States moved for judgment on the pleadings (R. 19). The facts as disclosed by the pleadings are substantially as follows:[2]

James H. Foley, a civilian clerk in the Office of the Paymaster, United States Marine Corps, Headquarters, Washington, D. C., was officially assigned to prepare Marine officers' pay and travel vouchers, to prepare checks payable to such officers in payment of such vouchers, to present the checks for signature by the Marine Corps paymaster or other disbursing officers duly authorized to draw checks on the Treasurer of the United States, and to deliver the signed checks to the named payees (R. 8, 12–13, 16). From time to time during a period of 28 months beginning shortly before July 14, 1936, and ending November 16, 1938, Foley forged pay and travel vouchers, together with the necessary supporting travel orders, and prepared 144 checks drawn on the Treasurer of the United States in the amounts set forth in the forged vouchers (R. 7–8). The checks and vouchers were payable to each of 16 actually

[2] The legal conclusions set forth in petitioner's answer (R. 6–18), many of which are reproduced in its petition for certiorari (pp. 3–5), were, of course, not admitted by the motion for judgment on the pleadings.

existing Marine Corps officers, many of whom were stationed in Washington, D. C., and none of whom was entitled to the proceeds of any of the checks or had any knowledge of the fraud (R. 8). Foley took the checks, vouchers, and travel orders he thus prepared and, without any intervening administrative scrutiny, presented them to the Marine Corps paymaster or other authorized disbursing officers (R. 8, 11–12). The paymaster and disbursing officers were unaware of the fraud and, relying exclusively on Foley's established reputation for honesty and integrity, they signed each of the checks in good faith without verifying the vouchers or travel orders (R. 8–9). Records and accounts of the Marine Corps existed which, if examined with care and diligence, would have disclosed the fraud in the issuance of the checks and the subsequent forgeries of their endorsements (R. 13, 17).

The paymaster or other disbursing officer returned the signed checks, vouchers, and orders to Foley for filing and distribution (R. 9). Foley did not deliver the checks to any of the 16 officers named as payees but forged the payee's signature as an endorsement on each check, added his own name as second endorser, and cashed or deposited the checks in his account at the Anacostia Bank of Anacostia, D. C. (R. 8–9). The Anacostia Bank made no investigation of the genuineness of the payees' signatures but took the checks in reliance upon its confidence in its depositor Foley (R. 9).

The Anacostia Bank then endorsed each of the checks "Pay to the order of any Bank, Banker or Trust Company. Prior endorsements guaranteed," and transmitting them to petitioner bank for collection. Petitioner in turn endorsed the checks with the same guarantee of "prior endorsements," and presented them to the Treasurer of the United States for payment (R. 9–10). The Treasurer paid the amount of the checks to petitioner (R. 9), which credited and later paid the collections to the Anacostia Bank (R. 10–11).

Thereafter, in November 1938, the Government discovered the fraud and the forgeries from the examination of its accounts and records (R. 7–8), and on December 8, 1938, made formal demand upon petitioner for repayment (R. 6), which was refused. Action was brought by the United States on August 11, 1942, to recover the payments (R. 1), the complaint consisting of a count for money paid by mistake (R. 1–2), and a count for breach of an express warranty (R. 2–3).

The District Court granted the motion of the United States for judgment on the pleadings (R. 19–20), and the United States Court of Appeals for the District of Columbia affirmed (R. 30).

SUMMARY OF ARGUMENT

There is unquestioned here the basic rule that the drawee who pays a check upon the forged endorsement of the payee may recover from the one who receives payment, for such payment has

been made in mistaken reliance upon the representation of the presenter that he has title. Petitioner seeks to exclude this case from that rule on the ground that as an agent for the cashing bank it retained no benefit from the transaction, and that the United States was negligent in issuing the check and in discovering the forgery. Neither ground is tenable.

I. While a disclosed agent may in some circumstances evade liability to return money received on a forged endorsement, as where the proceeds had been transmitted to the principal, that defense cannot be invoked by an undisclosed agent. Petitioner did not disclose to the United States by its endorsement on the checks, that it was a collecting agent for another bank. All the elements of a right in the United States to recover money paid under a mistake of fact are therefore present. The right of recovery is even clearer under the second count of the complaint, for breach of an express guarantee as to the genuineness of prior signatures. Such a form of endorsement originated to avoid controversy as to liability of the collecting bank; the disposition made by it of the collected proceeds is immaterial since its express contractual undertaking has been broken.

II. A drawer-drawee, such as the United States in the case at bar, owes no duty to persons volunteering to cash or collect checks, to protect them against fraudulent issuance of the check or the

consequent forgery of the payee's signature thereon. The Federal courts almost without exception have held that the drawer's negligence in failing to prevent or discover fraud in the issuance of checks or to discover the subsequent forgery of the payee's signature does not bar recovery, and the great weight of state authority is in accord. This Court applied that rule in *United States* v. *National Exchange Bank*, 214 U. S. 302. It is only when conduct of the drawer or drawee affirmatively misleads the cashing or presenting bank that the right of recovery may be defeated by estoppel. Here there can be no contention that the Government misled petitioner; and there was no representation by the Government, in fact or in law, that the payee had endorsed the checks. That issuance of the checks was induced by the fraud of the drawer's employee has likewise uniformly been rejected as a defense to an action for repayment, and efforts to amend the Negotiable Instruments Law to recognize such a defense have thus far been successful only in a handful of states.

The rule that the drawer owes no duty to the cashing or presenting bank is grounded on sound policy. The bank need not accept a check; and before it does it can assure itself of the validity of the instrument or the responsibility of the endorser who tenders it. As a matter of banking practice, the cashing or collecting bank is not concerned with, and does not inquire into the circumstances under

which the check was issued; it can safely cash a check only on the assumption that the one with whom it deals will make it good if necessary. Consequently, to afford the bank a defense against repayment because of circumstances which played no part in its determination to take the check, would give it a windfall. At the same time, such a rule would diminish the desirability of negotiable paper to drawers and cut into its wide use as a safe medium of payment. In view of the ease with which banks may protect themselves against forgery, the great weight of authority has wisely declined to encumber negotiable paper with a defense that hinges upon subsequent evaluation of the drawer's conformance to standards of care.

The decision in *United States* v. *Chase National Bank*, 252 U. S. 485, is not in point since that involved the forgery of the drawer's signature on a check payable to the drawer; under the exceptional doctrine of *Price* v. *Neal*, 3 Burr. 1354, the drawee is charged with the drawer's signature and cannot recover if that proves to be forged. That the payee's signature was also forged in the *Chase Bank* case does not make the decision applicable here, for since drawer and payee were the same, the drawee's chargeability with the drawer's signature could be extended to that of the payee. The decision of the Seventh Circuit Court of Appeals in *United States* v. *First National Bank of Chicago*, 138 F. (2d) 681, is out of line with the

great weight of authority and should be disapproved.

ARGUMENT

Certain undisputed principles underlie all suits to recover payments made upon a check bearing a forged endorsement. The drawer who calls upon the drawee to pay to the order of a named payee expects that payment will be made only as ordered; if the payee's endorsement is forged and the instrument is paid by the drawee to the forger or to an innocent transferee, the drawee has not paid according to the directions of his drawer and may not charge the latter's account.[3] The drawee, who paid the check in reliance upon the presenter's express or implied representation that he could give a valid discharge because title to the instrument had properly vested in him, may in turn recover from the presenter the money thus paid without consideration and under a mistake of fact, even though the latter is innocent of wrong.[4] And this right of recovery

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[3] *Farmers' State Bank* v. *United States*, 62 F. (2d) 178 (C. C. A. 5); see *First Nat. Bank* v. *Whitman*, 94 U. S. 343, 346–347; *Leather Manf.' Bank* v. *Merchants' Bank*, 128 U. S. 26, 34; Brannan, *Negotiable Instr. Law* (6th ed. 1938), p. 327.

[4] *Leather Manf.' Bank* v. *Merchants' Bank*, *supra*; *Insurance Co.* v. *Fourth Nat. Bank*, 12 F. (2d) 100 (N. D. Ga.); 28 F. (2d) 933 (C. C. A. 5), certiorari denied, 279 U. S. 853; *Continental Nat. Bank & Trust Co.* v. *Olney Nat. Bank*, 33 F. (2d) 437 (C. C. A. 7); Brannan, *op. cit. supra*, pp. 329–331.

against the presenter exists where the drawer and drawee are the same, for example, two agencies of the United States, as is the case here.[5]

These unchallenged rules would require judgment for the United States for the amount which it had paid to petitioner upon the 144 checks bearing forged endorsements of the payees. Petitioner, however, argues that an exception must be made here (1) because as a collecting agent for the Anacostia Bank petitioner turned over all the proceeds of the checks to the latter, and has not profited financially by the transaction, and (2) because the Government was negligent in not preventing or discovering the fraud and the forgeries before making payment to petitioner. These contentions, we submit, were properly rejected below. Petitioner also argues here, apparently for the first time, (3) that recovery should be denied because the checks were "false" and incapable of a genuine endorsement. This contention is equally without substance.

I

PETITIONER'S STATUS AS UNDISCLOSED AGENT FOR THE ANACOSTIA BANK DOES NOT BAR RECOVERY

Petitioner urges that the present action, being in essence one for restitution, should be governed by equitable principles; and that since petitioner as a collecting bank acted in good faith and turned

[5] *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 368; *United States* v. *National Exchange Bank*, 214 U. S. 302.

all the proceeds over to the cashing bank, it does not retain any money against good conscience (Br. pp. 11, 12). We submit that these considerations cannot prevail over the petitioner's implied warranty of good title to the instruments and its express guarantee of the genuineness of prior endorsements, both of which were broken.

The Government's complaint in the District Court comprised two counts—one for money paid by mistake, and the other for breach of an express guaranty (R. 1–3). Under the applicable principles, petitioner's status as an undisclosed collecting bank does not bar recovery on either count.[6]

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[6] Rights and obligations of the United States in fiscal matters arise under the Constitution and statutes and are determined by federal, not local law. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366; *United States* v. *Allegheny County*, 322 U. S. 174, 184; cf. *Irvine* v. *Marshall*, 20 How. 558, 563; *United States* v. *Robeson*, 9 Pet. 319, 325. In fashioning a uniform federal rule of decision in respect of the Government's negotiable paper, resort may be had to the law merchant developed under the regime of *Swift* v. *Tyson*, 16 Pet. 1, by the federal courts (*Clearfield Trust Co.* v. *United States*, *supra*, at 367) and to other usual common-law sources (*Smith* v. *Alabama*, 124 U. S. 465, 478; cf. *D'Oench, Duhme & Co.* v. *F. D. I. C.*, 315 U. S. 447, 468; *Board of Commissioners* v. *United States*, 308 U. S. 343, 350). This federal rule of decision remains applicable, despite *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, to rights and liabilities of the United States arising from Government checks. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366–367. Policies settled under federal authority may not be defeated or limited by local law. *United States* v. *Allegheny County*, *supra*, at p. 183; *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176. It has not yet been determined what effect is to be given the

There are present here all the requisite elements for recovery of money paid under a mistake of fact: Petitioner by presenting the checks and receiving payment thereon warranted, both impliedly and expressly, that it had title to the paper; but since the signatures of the payees had been forged, it had no title and the drawee paid out funds under a misrepresentation of an essential fact.[1] See *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 368–369. It has been the settled

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N. I. L. and other uniform laws in transactions involving the United States. (Cf. *Burns Mortgage Co.* v. *Fried*, 292 U. S. 487, 496; *Commercial National Bank* v. *Canal Bank*, 239 U. S. 520, 528–529; *Kobey* v. *Hoffman*, 229 Fed. 486, 488–489 (C. C. A. 8)). The court below relied in part, however, on D. C. Code, 1940 § 28–124, which reproduces section 23 of the Uniform Negotiable Instruments Law and provides that a forged signature "is wholly inoperative" and that no right to give a discharge for the instrument can be acquired thereby (R.). Since the federal rule and the statute of the District of Columbia as construed by its courts are identical, there is no need in the instant case to determine the weight to be given to local law.

[1] The situation, as regards recovery against the presenter, is strikingly analogous to an action for fraud. There is a misrepresentation of a material fact: made falsely (if the check is presented by a guilty party) or as a positive assertion without knowledge of its truth or falsity; intended to be acted upon; and acted upon with resultant loss. Cf. *Denning & Co.* v. *Sunerest Lumber Co.*, 51 F. (2d) 945, 948 (C. C. A. 4); *Equitable Life Ins. Co.* v. *Halsey, Stuart & Co.*, 112 F. (2d) 302, 308 (C. C. A. 7), reversed on other grounds, 312 U. S. 410; *Hackner* v. *Morgan*, 130 F. (2d) 300, 302 (C. C. A. 2). The element of "scienter" is supplied through the express guarantee of the genuineness of the payee's en-

federal rule that in such circumstances recovery may be had from the collecting bank in an action for money had and received, unless the drawee is estopped from asserting the forgery by reason of some positive misrepresentation which misled the presenting bank to its detriment. *Leather Manf.' Bank* v. *Merchants' Bank*, 128 U. S. 26, 34; *United States* v. *National Exchange Bank*, 214 U. S. 302, 311; Woodward, *Quasi Contracts* (1913) § 80; cf. *Espy* v. *Bank of Cincinnati*, 18 Wall. 604. Here there was no representation by the United States that the payee's signatures were genuine, nor any other assurance contrary to the fact. The only representations were those inherent in any check: that the drawee would pay upon order of the named payee.

The agency status of the collecting bank and its obligation to turn the money over to the forwarder become material only when those facts are clearly disclosed to the drawee; as for example where the paper has been endorsed "for collection." In such a case, recovery may be had only when the collecting bank retains in its possession money of its principal. *Wells, Fargo & Co.* v. *United States*, 45 Fed. 337, 340 (N. D. Cal.); *National Park Bank* v. *Seaboard Bank*, 114 N. Y. 28. Here petitioner did not disclose that it was acting as an agent, and the endorsements which it and the

dorsement, without any knowledge whatsoever of its truth or falsity. Cf. *Lehigh Zinc & Iron Co.* v. *Bamford*, 150 U. S. 665, 673; *Smith* v. *Richards*, 13 Pet. 26, 36.

Anacostia Bank placed upon the paper did not indicate any such status. Accordingly, petitioner cannot take advantage of the fact that it was acting as a collecting agent. *Philadelphia National Bank* v. *Fulton National Bank*, 25 F. (2d) 995, 996 (N. D. Ga.); *National Bank of Commerce* v. *Bossemeyer*, 101 Neb. 96; *Interstate Trust Co.* v. *United States National Bank*, 67 Colo. 6.

B. BREACH OF AN EXPRESS WRITTEN GUARANTY

The limited and conditional liability of a collecting bank which acted as a disclosed agent for a forwarding bank inevitably gave rise to the difficulties of establishing the fact of agency as well as whether at the time of suit it had funds of the forwarding bank in its possession. In order to obviate dispute as to liability in case of a forged endorsement, the New York Clearing House in 1896 required collecting banks expressly to guarantee prior endorsements, and this procedure gradually spread to other clearing houses throughout the country. See 13 *Banking Law Journal* (1896) 293, 445; 21 *id.* (1904) 99, 217, 246; *First Nat. Bank of Belmont* v. *First Nat. Bank of Barnesville*, 58 Ohio St. 207. As a result, a collecting bank which so endorsed checks presented for payment was as fully liable to the drawee if the payee's signature proved to have been forged, as was the cashing bank. *District Nat. Bank* v. *Washington Loan & Trust Co.*, 65 F. (2d) 831 (App. D. C.);

McKinnon v *Boardman*, 170 Fed. 920 (C. C. A. 2).

The United States always avails itself of the protection of this form of endorsement, as it did here. Petitioner endorsed each of the checks in suit "Pay to the order of any Bank, Banker or Trust Co. Prior endorsements guaranteed," before it presented the checks to the Treasury for payment (R. 9), and such an endorsement has become a *sine qua non* to payment of Government checks. As this Court noted in *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 365, Treasury regulations (31 C. F. R. 202.33) require all banks to endorse a guarantee of "prior endorsements" on Government checks presented for payment to Federal Reserve Banks or member bank depositories; and the uniform practice has been not to pay Government checks at the Treasury of the United States to an endorsee without such an endorsement (see Appendix, p. 43, *infra*).[*] The purpose of these requirements is to make the presenting bank absolutely responsible for the genuineness of the payee's endorsement and to enable recovery to be had directly from the presenting bank where that endorsement was forged, without regard to whether the bank was agent or principal. Cf. *Philadelphia National Bank* v. *Fulton National Bank*, 25 F. (2d) 995, 997 (N. D. Ga.).

[*] Petitioner admitted that it uniformly placed the guarantee of "Prior endorsements" upon all checks presented to the Treasury for payment (R. 9).

Unlike the count based upon payment under mistake, the cause of action for breach of an express guaranty of prior endorsements sounds strictly in contract; what the defendant did with the money received in return for his guarantee is not material.[8] Here, in reliance upon petitioner's express guaranty of the genuiness of prior endorsements, the United States paid out $18,060.83. A prior endorsement proved to have been forged, and the guarantee therefore became operative, and the damages are the sum paid by the Government. The situation is simply that of breach of a written contract, for which the United States paid a valuable consideration. Cf. *Home Ins. Co.* v. *Mercantile Trust Co.*, 219 Mo. App. 645, 284 S. W. 834. However, as in the *Clearfield* case (318 U. S. at 368), it is unnecessary to select one theory of recovery since all applicable theories support recovery from petitioner.

[8] Cf. Aigler, *Cases on Negotiable Paper and Banking* (1937), p. 555n: "On such questions [the effect of negligence and change of position] it may be important whether the plaintiff's action is purely quasicontractual or is grounded on a warranty found perhaps in the term of the defendant's indorsements." The observations in *United States* v. *Guaranty Trust Co.*, 293 U. S. 340, 349, that "The express guarantee of prior endorsements means no more than what is implied by every unrestricted endorsement," must be read in the context of the facts, which involved a presenting bank that had title to the instrument under the applicable foreign law. Because of that factor, denial of recovery against the presenting bank avoided circuity of action. Cf. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 367.

II

UNDER BOTH THE FEDERAL RULE AND THE OVERWHELMING WEIGHT OF STATE AUTHORITY, THE DRAWEE OWES NO DUTY TO A PRESENTING BANK TO PREVENT OR DISCOVER FORGERY OF THE PAYEE'S ENDORSEMENT

Petitioner's other principal contention is that the Government's lack of due care in issuing the checks and in failing to discover the forgeries and fraud constitutes a defense to the instant suit. The court below rejected this contention on the authority of its prior decision in *Washington Loan & Trust Co.* v. *United States*, 134 F. (2d) 59,[19] in which it had relied primarily upon *United States* v. *National Exchange Bank*, 214 U. S. 302. We submit that this ruling was correct on both authority and reason, since under the almost universally accepted rule a drawer-drawee owes no duty to transferees of the check to exercise diligence either in issuing it or in discovering a forgery of the payee's signature thereon.

[19] The sole factual difference between the *Washington Loan & Trust* case and the instant case, is that there the faithless Government employee prepared the fraudulent vouchers in the name of fictitious and nonexistent employees. But that difference is of no significance, since the agent drawing the checks thought the payees to be existing. See n. 26, p. 38, *infra*.

A. THE FEDERAL RULE [11]

United States v. *National Exchange Bank*, 214 U. S. 302, is pertinent here. There the issuance of 194 Government pension checks to some existing and some dead payees was procured during a period of about ten years by means of fraudulent and forged vouchers which were accepted as genuine by the Government, although its records would unquestionably have permitted discovery of the frauds at some point short of ten years (see 214 U. S. 305). There was thus the same lack of diligence in issuing checks against fraudulent vouchers as is charged here. Again, as in the present case, the endorsements of the payees were forged on each check and the checks were regularly cashed by the National Exchange Bank of Providence, which forwarded them to the National Bank of the Republic of Boston for collection. The latter presented the checks to the Assistant Treasurer of the United States at Boston, and received the amount thereof (214 U. S. 304, 309–310). Suit was brought against the Exchange Bank to recover the amounts thus paid.[12] The defendant contended that "the United States had been negli-

[11] See n. 6, p. 11, *supra*.

[12] Although the United States originally brought suit against the presenting bank (National Bank of the Republic), it later amended its action and substituted as defendant the Exchange Bank of Providence, apparently upon the theory that the presenting bank was not liable since it was acting as a disclosed agent of the Exchange Bank and did not

gent in not verifying the signatures of the payees of the checks in suits by comparing them with signatures of the payees in its possession" (214 U. S. at 305); that the United States was under a duty "to discover the forgeries promptly after payment" (214 U. S. at 311), and, because of the information in its records, was chargeable with knowledge of the payees' identity, continued existence, true signatures, and right to receive the checks (214 U. S. at 318). (Cf. the contention urged by petitioner here, Br. p. 7.)

This Court unanimously rejected those contentions and held that the United States owed no duty to the cashing bank to discover the fraud and forgeries, and was not chargeable with knowledge of the facts regarding the issuance of the checks and the placing of the payees' signatures thereon.[12] Adverting to the procedure prescribed by the Government for the preparation and certification of the vouchers pursuant to which the checks were issued, the Court added (214 U. S. at 318–319):

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represent itself to be the owner of the checks. That rule had already been enunciated at the time suit was instituted. See cases cited, p. 13, *supra*.

[12] The *Exchange Bank* case also stands for the proposition that it was not a condition precedent to suit that prompt notice of the discovery of the forgery be given by the drawee. It was with this aspect of the case that this Court was primarily concerned in *Clearfield Trust Co.* v. *United States*, 318 U. S. 363.

> These requirements are incompatible with the assumption that the Government was chargeable with knowledge of the identity, continued existence, and right to pensions, or with the signatures of those entitled to receive pension moneys. The requirement by the Government of proof, for its own protection, affords no ground for the contention that as to any action taken as the result of the furnishing of such proof the Government is estopped as to third parties from showing that the proofs furnished were false and fraudulent and that the Government had been deceived thereby. To so hold would be to say that from the act of exerting a precaution against fraud there arose a presumption by which the fraud could be successfully accomplished. This would be the case if it were now held that because by forged vouchers the Government was deceived into acting third parties had a right to rely upon the integrity of the proof and to estop the Government as though representations as to the verity of such proof had been made by it to such third parties. The rights, therefore, of the bank as the apparent acquirer of the pension checks are to be governed by the nature and character of the instruments and cannot be enlarged so as to relieve the bank from the obligation of warranty implied in the presentation of the checks and the collecting of the amount.

Since the Court held that the drawer-drawee owed no legal duty to the cashing bank to pre-

vent or discover the fraud in the issuance of the checks and the forgery of the payees' signatures thereon, the lack of due care in this respect could not constitute legal negligence as against the bank.[14] Safeguards analogous to those discussed in the *Exchange Bank* case surround the issuance of the checks involved here (R. 12–13); those safeguards, which petitioner invokes here (Pet. Br. pp. 7, 8, 11), were intended for the Government's benefit, and are not available to petitioner as a defense merely because the precautions failed to achieve their purpose. *Onondaga County Savings Bank* v. *United States*, 64 Fed. 703, 704–705 (C. C. A. 2), affirming 39 Fed. 259, 261 (N. D. N. Y.); cf. *United States* v. *Kirkpatrick*, 9 Wheat. 720, 736–767. Any other rule would achieve the absurdity of charging the Government with the signatures of the payees upon some 290,000,000 checks which it now issues annually—a chargeability expressly denied in *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 369.

The Federal courts, almost without exception, have permitted recovery against the cashing or presenting bank although the negligence of the drawer in failing to discover or prevent a fraud

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[14] Cf. *Insurance Co.* v. *Fourth Nat. Bank*, 12 F. (2d) 100, 102 (N. D. Ga.), where the drawer negligently failed to discover the fraud and Judge Sibley observed:

"* * * A discovery by the insurance company of the fraud would probably have led to discovery of the forgery of the indorsements, but it owed no duty to the bank to discover either. Its only duty was to complain after actual discovery of the forgery."

in the issuance of checks plainly contributed to their subsequent forgery; since neither the drawer or the drawee was thought to owe a duty to the presenting or cashing bank promptly to discover the forgery of an endorsement, failure to do so was no defense.[15] And the court below, in its prior decision in *Washington Loan & Trust Co.* v. *United States*, 134 F. (2d) 59, explained as follows that aspect of this Court's decision in the *Exchange Bank of Providence* case (134 F. (2d) 61–62):

> In such a state of facts the Supreme Court held that the bank, in paying the forged checks, acted wholly upon the apparent genuineness of the instruments and the responsibility of those presenting them, that the Government, in the circumstances, was not charged with knowledge of its

[15] *Ladd & Tilton Bank* v. *United States*, 30 F. (2d) 334, 338 (C. C. A. 9); *Security Savings Bank* v. *First National Bank*, 106 F. (2d) 542, 545, 546 (C. C. A. 6); *United States* v. *National Bank of Commerce*, 205 Fed. 433, 436–437 (C. C. A. 9); *Insurance Co.* v. *Fourth Nat. Bank*, 12 F. (2d) 100, 102 (N. D. Ga.); *District Nat. Bank* v. *Washington Loan & Trust Co.*, 65 F. (2d) 831, 833 (App. D. C.); *City Bank* v. *Hamilton National Bank*, 108 F. (2d) 588 (App. D. C.); *Onondaga County Savings Bank* v. *United States*, 64 Fed. 703 (C. C. A. 2). Cf. *National Metropolitan Bank* v. *Realty Appraisal & Title Co.*, 47 F. (2d) 982 (App. D. C.), and *Continental Nat. Bank & Trust Co.* v. *Olney Nat. Bank*, 33 F. (2d) 437, 438–439 (C. C. A. 7), applying the rule to actions by drawer against drawee. In the majority of these cases, not only was there lack of care in the issuance of checks but also in failing to discover forgeries which continued over an appreciable period of time.

> payees' signatures, and that, consequently, its failure to detect the forgeries did not estop it from recovery. In other words, the failure of the Government to detect the fraud, though due to negligence, was not the cause of the loss, since in the whole transaction the Government and the bank dealt at arm's length, and the primary obligation of the bank to see to the genuineness of the endorsements continued throughout.

While recovery may be precluded when the drawee's negligence is of an affirmative character and directly and proximately affects the conduct of the cashing or presenting bank, there is here neither claim nor showing that petitioner was induced by any conduct of the United States to present the check and collect its proceeds and turn them over. Petitioner undoubtedly relied upon the responsibility of the Anacostia Bank and its express guaranty of the genuineness of the payee's signature (Cf. *City of New York* v. *Bronx County Trust Co.*, 261 N. Y. 64, 72–73; *National Bank of Commerce* v. *Fish*, 67 Okla. 102, 104, but this could give petitioner recourse only against that bank, not a defense against the drawee which paid the money to petitioner.

A rule thus uniformly applied to private drawer-drawees may *a fortiori* be available to the United States,[16] but in any event the United

[16] Ordinarily the negligence of its officers and servants does not preclude the United States from recovery from sureties

States as drawee of commercial paper owes no greater duty to third persons than does any other drawee (*cf. Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 367–369). Petitioner contends (Br. p. 8), "that Government checks differ from private checks in that they can be expended only in compliance with statutory law and in banking circles they pass virtually on the basis of currency," and urges that the only risk which banks should be asked to bear in regard to forgery of the payee's signature on Government checks, is that of the loss or theft of the check. Such arguments were long ago rejected by this Court in *Smoot's Case*, 15 Wall. 36, 45–46:

> There is in a large class of cases coming before us * * * a constant and ever recurring attempt to apply to contracts made by the government, and to give to its action under such contracts, a construction and an effect quite different from those which courts of justice are accustomed to apply to contracts between individuals. There arises in the mind of parties and counsel interested for the individual against the United States a sense of the power and resources of this great government, prompt-

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and guarantors even when private litigants would be barred. *United States* v. *Hartford Accident & Indemnity Co.*, 117 F. (2d) 503, 505 (C. C. A. 2); *Hunter* v. *United States*, 5 Pet. 173, 187–188; *Hart* v. *United States*, 95 U. S. 316, 318. The rule has been applied to the negligence of state officers touching negotiable paper, *New Amsterdam Casualty Co.* v. *Albia State Bank*, 214 Iowa 541.

> ing appeals to its magnanimity and generosity, to abstract ideas of equity, coloring even the closest legal argument. * * *
>
> It would be very dangerous, indeed, to the best interests of the government— * * *—if, adopting the views so eloquently urged by counsel, that court, or this, should depart from the plain rule laid down above, and render decrees on the crude notions of the judges of what is or would be morally right between the government and the individual.

Petitioner characterizes the checks here involved as "false checks" (Br. pp. 5, 9, 10), apparently with the view to excepting them from the settled rule permitting recovery of payment made under a false endorsement. Such an argument is footless. The checks were signed by duly authorized disbursing officers of the United States and were made payable to existing persons to whom the disbursing officers believed the United States to be indebted. Had these checks been endorsed by the named payees themselves, a subsequent holder in due course, under the universally accepted rule, could have enforced payment against the United States despite the fraudulent inducement of their issuance. See Brannan, *op. cit. supra*, n. 3, at pp. 599, 685. The fact that the checks were issued pursuant to fraudulent vouchers had no other effect upon the checks than to afford a defense to the United States in a suit by

the payees or by transferees who were not *bona fide* purchasers for value without notice.[16] The fallacy of petitioner's argument is demonstrated by the numerous cases where the United States has recovered payments made on forged endorsements although the issuance of the check was procured by fraud.[17]

The overwhelming weight of authority in the state courts is in accord with the federal rule that the drawer's negligence in preventing or discovering fraud and forgery does not bar recovery of payments made under a forged endorsement.[18]

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[16] *United States* v. *National Exchange Bank*, 214 U. S. 302; *Onondaga County Savings Bank* v. *United States*, 64 Fed. 703 (C. C. A. 2); *Farmers' State Bank* v. *United States*, 62 F. (2d) 178 (C. C. A. 5); *Washington Loan and Trust Co.* v. *United States*, 134 F. (2d) 59 (App. D. C.). The same rule is, of course, applicable to checks issued by private persons. See cases cited in note 18, *infra*.

[17] *Los Angeles Investment Co.* v. *Home Savings Bank*, 180 Cal. 601, 610; *U. S. Storage Co.* v. *Central Bank*, 343 Ill. 503, 513; *National Metropolitan Bank* v. *Realty Appraisal & Title Co.*, 47 F. (2d) 982, 984 (App. D. C.); *State Bank of Chicago* v. *Mid-City Trust and Savings Bank*, 232 Ill. App. 186, 190–191; *United Workmen* v. *Bank*, 92 Kan. 870, 888–889; *Jordan Marsh Co.* v. *National Shawmut Bank*, 201 Mass. 397, 407, 408; *American Sash and Door Co.* v. *Commerce Trust Co.*, 332 Mo. 98, 110; *City of St. Paul* v. *Merchants National Bank*, 151 Minn. 485, 488; *Shipman* v. *Bank of New York*, 126 N. Y. 318, 329; *Seaboard National Bank* v. *Bank of America*, 193 N. Y. 26, 32; *Commonwealth* v. *Globe Indemnity Co.*, 323 Pa. 261, 267; Brannan, *op. cit.*, *supra*, n. 3, p. 331.

Most of the above cases involved suits by a drawer against the drawee, but the rule applies *a fortiori* in respect of a suit against a collecting bank. A drawer owes some duty of care

Efforts to amend the Negotiable Instruments Law to give the presenting bank a defense in situations such as the instant case have so far been successful in only four states.[19]

B. THE RULE IS SOUND IN POLICY

Strong considerations of policy support the almost universal rule that the drawer owes no duty to protect one who voluntarily cashes a check against the forgery of the payee's signature. No one is compelled to cash a check or to accept an endorsement; and the endorsee who does not know the payee and is not satisfied with the genuineness

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to the drawee, but the drawee and the collecting bank deal at arm's length in respect of the payee's endorsement. *Sprague v. West Hudson County Trust Co.*, 92 N. J. Eq. 639, 642.

[19] The amendment sponsored by the American Bankers Association (27 Ill. L. Rev. 564; 14 Notre Dame Lawy. 126) would change Section 9 of the Act (dealing with situations in which an instrument would be considered as payable to bearer) to read as follows:

"Third. When it is payable to the order of a fictitious or nonexistent or living person not intended to have any interest in it, and such fact was known to the person making it so payable, or known to his employee or other agent who supplies the name of such payee."

It has been adopted in Illinois (*Houghton Mifflin Co. v. Continental Bank*, 293 Ill. App. 423); Idaho (Code, 26-109); Montana (Rev. Code, § 8416); and Massachusetts (Acts 1941, c. 215). The amendment has never had the support of the Commission on Uniform State Laws, see Beutel, *The N. I. L. Should Not Be Amended*, 80 U. of Penna. L. Rev., 368, 377, *et seq.* A bill, H. R. 3513 (78th Cong., 1st Sess.), to amend the Code of Laws of the District of Columbia to comport with the amendment sponsored by the American Bankers Association, has thus far not been reported out of committee, so far as we know.

of the endorsement can and usually will decline to accept it or to pay out money on the strength of it. Similarly, where a check is submitted to a bank for cashing by an alleged endorsee of the payee (as in the case at bar), the bank is not required to cash the check; if it does, it relies not upon any representations which could be derived from the fact of the check's issuance, but upon the responsibility and integrity of the person tendering the instrument to it. See *White* v. *Continental National Bank*, 64 N. Y. 316, 320–321. Checks are not likely to be cashed for an unidentified stranger, regardless of the reputability of the other names on the paper as drawer or payee. And conversely, checks drawn by an unknown maker upon an unknown drawee and endorsed by an unknown payee, will readily be accepted by banks which know and are willing to rely upon the person who tenders and endorses the check for deposit or cash. For these reasons one who pays out money on a check is not concerned with the circumstances of its issuance, nor with what precaution against forgery the drawer may have taken before or after emitting the check. If the payee's endorsement is forged and loss occurs it was the "neglect or error" of the cashing or collecting bank "in accepting the forger's signature which occasions the loss." *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 370.

Were a contrary rule to obtain, facts unknown to a cashing bank and upon which it did not and could not rely would enable it to evade the expected result of its mistaken reliance upon the integrity or responsibility of those with whom it deals. If a check payable to the order of a named payee is stolen or lost and the endorsement forged, the loss unquestionably falls upon him who accepts the endorsement and thereafter negotiates the paper or collects it. The situation is outwardly no different where the issuance of the check is procured by fraud and the payee's signature forged; in both cases the drawer's direction that the drawee should pay to the order of a designated person, or the drawer-drawee's intention so to pay, has not been satisfied; and in neither case did any conduct of the drawer mislead the casher. Moreover, to give the cashing bank the benefit of circumstances which had no bearing upon the bank's election to accept the check would merely bestow a windfall upon it. It could not count on the defense of the drawer's failure to adopt adequate precautions; hence, the bank would have to take identical precautions in all cases—i. e., to satisfy itself of the responsibility of the tenderer of the check, or to identify the payee's signature. If the facts should later prove to involve some negligence on the part of the drawer, the cashing bank would unfairly be afforded the benefit of something which was of no concern to it and which was not taken into account when it accepted the check.

All these considerations are equally pertinent to a collecting bank. Such a bank normally has no knowledge of the genuineness of the payee's endorsement and has no facilities for inquiring into it; it relies solely upon its confidence in the responsibility of the person who has endorsed the check to it. The collecting bank has no concern with the circumstances surrounding the issuance of the checks, and obviously does not rely upon or speculate as to whether the drawer might have been negligent in issuing the check or in discovering a fraud. It is upon this basis that the business of banks is conducted. *City of New York* v. *Bronx County Trust Co.*, 261 N. Y. 64, 72; *McKinnon* v. *Boardman*, 170 Fed. 920, 922 (C. C. A. 2). If the endorsement of the payee is subsequently discovered to be forged, collecting banks merely charge the account of the prior endorser with whom they dealt. They suffer no loss unless the prior (genuine) endorsers are insolvent, in which event it is the latter's financial irresponsibility which causes the loss and not the fact that there may have been negligence on the part of the drawer before or after the issuance of the check.[20]

The rule contended for by the petitioner would destroy the certainty of rights and liabilities which give to checks their value as instruments of credit and payment. Drawers would be unwilling to risk the free use of checks if the result

[20] We understand that it is customary for banks having a large collection business to insure against loss by forgery.

of any negligence, however slight, were to render the paper payable to bearer, contrary to its designation as order paper. See Kessler, *Forged Indorsements,* 47 Yale Law Journal 863. Because "negligence" is an elastic concept, the inability to predict the conclusion of a court or jury would introduce an element of uncertainty in negotiable paper that might well seriously affect its use. Moreover, since the task of investigating the circumstances under which each check was issued is an impossible burden which no bank could undertake, it would have to assume that the risk of forgery would fall upon itself, and would fix its interest rates, discount charges, and other practices accordingly. The avoidance of the result of that risk because of the fortuitous and irrelevant circumstances of the drawer's negligence would then merely give the bank the undeserved benefit of a defense upon which it did not and could not count. For these reasons, the person accepting an endorsed check and paying out cash thereon is bound at his peril to ascertain that the endorsements are genuine. *American Security Company* v. *Empire Trust Company*, 262 N. Y. 181. And, as already noted, this duty is not unduly onerous since the endorsee need merely decline to accept the instrument unless satisfied with the genuineness of prior signatures or with the responsibility of the endorser. Weighed against the serious threat to the desirability and free use of negotiable paper which the

contrary rule would entail, the prevailing rule is mild in the requirement it imposes upon cashing and collecting banks—that they rely upon those with whom they deal, in accordance with the usual banking and commercial practice.

These considerations were excellently summed up by the Court of Appeals of New York in *Gallo* v. *Brooklyn Savings Bank*, 199 N. Y. 222, 226, 92 N. E. 633, 634 (1910):

> Corporations, some of them numbering their stockholders by thousands, and usually ignorant of their identity and signatures, pay their dividends by checks to the orders of the various stockholders, transmitted by mail, relying on their right to reclamation from the banks in case the checks have been indorsed or collected by persons not entitled thereto. So also, a person will send by post to the most distant part of the country his check to the order of another person to whom he wishes to pay or transfer money, confident in the knowledge that the abstraction of the check can entail no loss on him. On the continent of Europe a different rule prevails, and payment by the drawee to a party presenting the same, of a bill drawn to order, is valid, even though the indorsement is forged, provided the drawee acts in good faith and without negligence. In England the common-law rule prevailed as to bills (but not as to checks) until the Bills of Exchange Act of 1882, which adopted the continental rule as to sight bills, but

not as to time bills, though a limited protection against forgery of the name of the payee may be had by "crossing".[21] Such a rule would render the present business methods of this country impossible. Although at times banks have complained of the harshness of our rule, and in some instances while acting in good faith have been subjected to severe loss (*Shipman* v. *Bank of the State of N. Y.*, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821), as a result of this rule banks are used by all classes of our people for the deposit of funds and payment is made by check to an extent unknown elsewhere. Of course a party entitled to the receipt of money may insist upon its payment in cash and not by check.

C. THE DECISION IN UNITED STATES *v.* CHASE NATIONAL BANK, 252 U. S. 485, IS NOT PERTINENT

Petitioner bases its argument almost exclusively upon an alleged identity between the facts in this case and those in *United States* v. *Chase National Bank*, 252 U. S. 485 (Pet. Br. pp. 14–15, 19), and contends that it is not equitably obligated to

[21] It is the undoubted law of England, however, that the presenter of the check is liable to the drawer although the latter's vouchering clerk fraudulently supplied the name of a payee not entitled to have any interest in the check, as in the case at bar. Compare *Clutton* v. *Attenborough & Son*, (1897) A. C. 90, and *Vinden* v. *Hughes*, (1905) 1 K. B. 795, 801–802, with *Bank of England* v. *Vagliano Bros.*, (1891) A. C. 107. See also *Macbeth* v. *North & South Wales Bank* v. *Macbeth*, (1908) 1 K. B. 13, 17, affirmed, (1908) A. C. 137.

refund the money (Br. p. 10). We submit that the *Chase National Bank* case is not applicable, since there the drawer's signature was forged, justifying application of the familiar doctrine of *Price* v. *Neal*, 3 Burr. 1354 (1762), that the drawee who pays in such a situation cannot recover the payment. And contrary to petitioner's interpretation, the decision there did not turn either on equitable considerations or on the circumstance that the check was unlawfully issued.

In the *Chase Bank* case, a finance clerk in the United States Army fraudulently drew a check upon the Treasurer of the United States, forging the name, as drawer, of an Acting Quartermaster authorized to draw checks. The check was made payable to the order of the drawer, and the faithless employee also forged the drawer's signature as the payee's endorsement, then cashing the check at the Howard National Bank. That Bank endorsed and forwarded the check to the Chase National Bank for collection, and the latter received payment from the Treasurer. In a suit brought to recover the payment, the district court gave judgment for the defendant on the ground that in the circumstances the check was payable to bearer (241 Fed. 535), and the Circuit Court of Appeals for the Second Circuit affirmed on the same ground (250 Fed. 105). This Court in turn affirmed, but in reliance upon the rule of *Price* v. *Neal*, 3 Burr. 1354, which holds the drawee charge-

able with knowledge of the drawer's signature and hence bound by acceptance or payment even if that signature is forged. Under that rule, this Court held that the United States was estopped, after acceptance, to deny the forgery of the drawer's signature (252 U. S. at 494). The added forgery of the payee's signature was held not to have placed the drawee in any worse position than resulted from its acceptance of the forged signature of the drawer (252 U. S. at 496). This was merely an application of the doctrine of *Price* v. *Neal*, for a drawee who is charged with knowledge of the drawer's signature can also be charged with knowledge of the payee's signature, where drawer and payee are one.

Moreover, the *Chase Bank* case was solely an action for the recovery of money paid by mistake; it was not combined, as was the instant case, with an action for breach of an express guaranty of the genuineness of prior endorsements; nor could it have been based upon the implied warranty of title.[22]

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[22] The cashing bank had endorsed the check specially to the order of the Chase Bank and had guaranteed restrictive endorsements only (252 U. S. at 491); but inasmuch as there were no restrictive endorsements, such a guaranty came to nothing. Cf. *Planters' Bank & Trust Co.* v. *Union Trust Co.*, 56 Ohio App. 309, 322, 335. The Chase Bank gave no guaranty of prior endorsements but merely receipted for payment. Since the Chase Bank was a depositary of public moneys and was acting as a fiscal agent of the United States

That nothing in the *Chase Bank* case would operate as a defense where, as here, recovery is sought from a collecting bank for breach of an express guaranty of prior endorsements upon a check upon which the payee's but not the drawer's signature was forged, may be gathered from the virtually solid body of Federal decisions permitting recovery after the *Chase Bank* decision, and following the rule in the *Exchange Bank* case (see cases cited p. 22, n. 15, *supra*). The ruling in the latter case, that the exceptional rule of *Price* v. *Neal* cannot be extended to cases of fraud in the issuance of checks or forgery of the payee's endorsement (214 U. S. at 317),[23] has recently been adverted to with approval. See *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 369.

(cf. R. S. 5153, 12 U. S. C. 90), it may be questioned if a warranty of title could be implied. The warranty of title aspect of the case was disposed of with the observation that no one had a better title than the collecting bank (252 U. S. at 493). That observation could not apply where the check was signed by an authorized disbursing officer and made payable to an existing payee intended to receive the proceeds, as was true of the checks in the case at bar.

[23] The Court declared (214 U. S. 317):

"* * * To apply the rule, however, to the Government and its duty in paying out the millions of pension claims, which are yearly discharged by means of checks, would require it to be assumed that that was known, or ought to have been known, which on the face of the situation was impossible to be known, would besides wholly disregard the relation between the parties and would also require that to be assumed which the obvious dictates of common sense make clear could not be truthfully assumed."

D. THE DECISION IN UNITED STATES *v.* FIRST NATIONAL BANK OF CHICAGO IS ERRONEOUS AND SHOULD BE DISAPPROVED

The only case holding that the United States is under a duty to prevent or discover fraud in the issuance of checks and the forgery of their endorsements is *United States* v. *First National Bank of Chicago*, 138 F. (2d) 681 (C. C. A. 7),[24] the conflict of which with the decision below led to United States not to oppose the granting of certiorari here. That case arose under peculiar circumstances. There the United States sued the collecting bank to recover on 22 pension checks issued between 1927 and 1934 to the order of a payee who the issuing officer in the Pension Bureau did not know was dead, although the Veterans Bureau, which had no connection with the pension checks or the Pension Bureau, had paid a statutory allowance for the payee's burial. The court held that the United States was chargeable with the knowledge of the payee's death, and hence with knowledge of the forgery;[25] that the

[24] Petitioner, although it alleged a conflict with the *First National Bank of Chicago* case as a ground for certiorari (Pet. 7), does not rely upon that case in its brief filed herein. There is dictum to the same effect in *Security-First National Bank* v. *United States*, 103 F. (2d) 188, 191 (C. C. A. 9). If this dictum still retains vitality after the decision of this Court in the *Clearfield Trust Company* case (318 U. S. at 366), it has no firmer basis than the holding in the *First National Bank* case.

[25] Although no statute or regulation required the Veterans Bureau to transmit information of this character to the Pension Bureau, the court presumed the existence of such a duty

United States was negligent in not giving notice of the forgery to respondent as soon as the Veterans Bureau learned of the payee's death; and that the bank, having suffered an intervening loss of recourse against prior endorsers as to 18 checks, was exonerated on that ground. Cf. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 370.[26]

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because a reasonably prudent businessman would have taken that precaution. The Court completely ignored the other precautions—not available to businessmen—which the United States had taken to prevent forgery of a dead payee's signature to pension checks: the requirement that all postmasters, delivery clerks, or letter carriers who learn of the death of a pensioner must return the letter containing the pension check with a suitable notice of the death of the payee. Act of August 17, 1912, c. 301, 37 Stat. 311, 312, as amended by the Act of June 3, 1936, c. 482, 49 Stat. 1396 (38 U. S. C. 50).

[26] The C. C. A. rejected, *sub silentio*, the argument that the checks were payable to bearer because the drawer of the checks was chargeable with the knowledge of the death of the payee. While that might have been a more logical disposition of the case, nothing else appearing, the court was confronted with its own prior decision in *Continental Nat. Bank & Trust Co.* v. *Olney Nat. Bank*, 33 F. (2d) 437, 439, that it was the intention of the drawer which controlled and that a check drawn to a nonexistent payee is payable to bearer only if the drawer knew he was nonexistent. That decision followed the accepted rule. *Robertson Banking Co.* v. *Brasfield*, 202 Ala. 167, 168; *Los Angeles Investment Co.* v. *Home Savings Bank*, 189 Cal. 601, 606; *Fletcher Am. Nat. Bank* v. *Crescent Paper Co.*, 193 Ind. 329, 340–341; *U. S. Storage Co.* v. *Central Bank*, 343 Ill. 503, 511; *Harmon* v. *Old Detroit Nat. Bank*, 153 Mich. 73, 78–79; *City of St. Paul* v. *Merchants National Bank*, 151 Minn. 485, 488–489; *Shipman* v. *Bank of New York*, 126 N. Y. 318, 330;

In respect of the remaining four checks on which the defendant had not lost its right of recourse, the court held that the Government's negligence was so gross as to preclude the United States from recovering on the forged endorsements.

As to the four checks on which the defendant bank had not lost its right of recourse, the decision is in effect a ruling that the United States is under a duty to the collecting bank to investigate

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Armstrong v. *National Bank*, 46 Ohio St. 512, 521; *Joseph Milling Co.* v. *First Bank of Joseph*, 109 Ore. 1, 18; *Commonwealth* v. *Globe Indemnity Co.*, 323 Pa. 261, 266. As was remarked in *Seaboard National Bank* v. *Bank of America*, 193 N. Y. 26, 33, "Such intention to be effective must necessarily arise from knowledge and exist as an affirmative fact in the mind of the drawer of a draft at the time of its delivery."

The court also rejected, *sub silentio*, the contention that the United States was estopped to assert the forgery because under §§ 61 and 62 of the N. I. L., the drawer warrants the existence of the payee and his capacity to endorse. Such obviously is not the federal rule. *United States* v. *National Exchange Bank*, *supra*; *Onondaga County Savings Bank* v. *United States*, 64 Fed. 703 (C. C. A. 2); *United States* v. *First National Bank of Coffeyville*, 82 Fed. 410 (D. Kan.). Nor do §§ 61 and 62 of the N. I. L. stand for that proposition. Drawers and acceptors may admit the existence of the payee and his capacity to endorse but not that the payee *will* endorse, or has in fact endorsed, or that an unauthorized endorsement will be accepted as the payee's. *American Express Company* v. *Peoples Savings Bank*, 192 Ia. 366; *Robertson Banking Co.* v. *Brasfield*, 202 Ala. 167; *Ocean Accident & Guaranty Corp.* v. *Lincoln National Bank*, 112 N. J. L. 550; *National Union Fire Insurance Company* v. *Mellon Bank*, 276 Pa. 212; 90 *University of Pennsylvania Law Review*, 973; see 22 *Boston U. Law Review*, 336, 340. At most,

its records for the purpose of ascertaining whether the payee's signature has been forged. That holding is clearly out of line with the weight of authority. *United States* v. *National Exchange Bank, supra; Onondaga County Savings Bank* v. *United States*, 64 Fed. 703 (C. C. A. 2); see also cases cited p. 22, n. 15, and p. 26, n. 18, *supra*. Absent any such duty, the court was plainly wrong in holding that the negligence of the United States in issuing the checks precluded recovery.

In respect of the 18 checks as to which recourse had been lost, the decision, based upon the imputation of knowledge of the payee's death to the drawer, is equally unsound, for the officer specially charged with the duty of giving notice of the discovery of the forgery was the Treasurer of the United States. 31 C. F. R. § 202.34. Neither that official nor his subordinates had actual knowledge of the death of the payee nor of the existence of any forgery; hence, the duty of the United States to give prompt notice of the *discovery* of a forgery upon penalty of loss of rights against the collecting bank, if its right of recourse is lost in the meantime (*Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 369–370), could never become operative. In *Cooke* v. *United*

§ 61 of the N. I. L. "estops plaintiff from denying the existence of the payees but does not estop plaintiff from proving that the signatures of the payees were forged" (*Dorsey* v. *Manhattan Co.*, 33 N. Y. Supp. (2d) 69, 74).

States, 91 U. S. 389, this Court declining to impute to the Treasurer the knowledge of an Assistant Treasurer that the drawer's signature had been forged, said (at p. 398):

> Generally, in respect to all the commercial business of the government, if an officer specially charged with the performance of any duty, and authorized to represent the government in that behalf, neglects that duty, and loss ensues, the government must bear the consequences of his neglect. But this cannot happen until the officer specially charged with the duty, if there be one, has acted, or ought to have acted.

The rationale of the *Clearfield* case is that prompt notice to the collecting bank that forgery had been discovered would have prevented loss to that bank by permitting it to seek recourse against the forwarding bank in time; but one can not be required to give notice of a fact of which he has no actual knowledge. Since imputation of knowledge in such circumstances is tantamount to the imposition of a duty to find out, the practical effect of the decision in the *First National Bank of Chicago* case is to hold the United States liable for failure of the officer specially charged to discover the forgery. This, as we have pointed out above, runs counter to the great weight of authority, both federal and state.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment should be affirmed.

CHARLES FAHY,
Solicitor General,
FRANCIS M. SHEA,
Assistant Attorney General,
DAVID L. KREEGER,
Special Assistant to the Attorney General,
PAUL A. SWEENEY,
W. LEAVENWORTH COLBY,
Attorneys.

DECEMBER 1944.

APPENDIX

GENERAL COUNSEL,
TREASURY DEPARTMENT,
Washington 25, December 6, 1944.

Re: *United States* v. *National Metropolitan Bank*; re reclamation on checks cashed by James F. Foley on forged endorsement.

Honorable FRANCIS M. SHEA,
Assistant Attorney General,
Department of Justice,
Washington 25, D. C.

MY DEAR MR. SHEA: In response to your informal request concerning the method employed in respect to endorsement of checks presented for payment to the Treasury, the following is the ordinary procedure:

Where a check is presented by a bank, it is customary to require that the bank guarantee the genuineness of all prior endorsements. If a check were found by the Treasurer to have been presented without this guarantee, payment would be declined.

Very truly yours,
[Signed] NORMAN O. TIETJENS,
Assistant General Counsel.

U. S. GOVERNMENT PRINTING OFFICE: 1944

SUPREME COURT OF THE UNITED STATES.

No. 161.—October Term, 1944.

National Metropolitan Bank, a Corporation, Petitioner, *vs.* United States of America.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[January 8, 1945.]

Mr. Justice Black delivered the opinion of the Court.

One Foley, a civilian clerk in the Paymaster's office of the Marine Corps, procured the issuance of 144 government checks, duly signed by the authorized disbursing officials, by forging pay and travel mileage vouchers in the names of living Marine Corps officers. These forgeries occurred during a period of twenty-eight months, beginning shortly before July 14, 1936, and ending November 16, 1938. The checks were drawn on the United States Treasury payable to the order of the officers and delivered to Foley for distribution to them. Foley forged their endorsements, added his own name as second endorser, and deposited or cashed the checks at the Anacostia Bank. That bank, without investigating the genuineness of the payees' signatures, endorsed the checks and transmitted them to the petitioner bank, which collected on them from the government. Both banks specifically guaranteed prior endorsements. About November 21, 1938, the government discovered the fraud and the forgeries, and on December 8th formally demanded repayment from the petitioner. Repayment was refused. On August 11, 1942, the government brought this suit in the District Court to recover the payments made. The complaint contained two counts, one for breach of express warranty, and one for money paid under a mistake of fact. The bank filed an answer in which it admitted that it had collected the moneys for the account of the Anacostia Bank after presenting the checks to the government with its stamped endorsement guaranteeing prior endorsements. As defense it set up the following: (1) the endorsement did not amount to a guaranty of the payee's signature; (2) issuance of the checks by the government was a war-

ranty that they were not "fictitious", but genuine and issued for a valuable consideration, and this warranty was breached; (3) the government's disbursing agencies neglected properly to supervise and examine the transactions both before and after the first and succeeding checks were issued, thereby delaying discovery of the fraud, and this neglect, not the bank's guaranty, caused the government's loss. The District Court granted the government's motion for judgment on the pleadings, and the Court of Appeals affirmed, 142 F. 2d 474, on the authority of its own prior decision in *Washington Loan & Trust Co.* v. *United States*, 134 F. 2d 59 (1943). Because of a conflict with *United States* v. *First National Bank*, 138 F. 2d 681, (C. C. A. 7, 1943), we granted certiorari.

Only recently, in *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, we had occasion to consider rights and liabilities of the government which stem from the issuance and circulation of its commercial paper. Our conclusion was that legal questions involved in controversies over such commercial papers are to be resolved by the application of federal rather than local law and that, in the absence of an applicable Act of Congress, federal courts must fashion the governing rules. Some of the questions petitioner argues here are foreclosed by the *Clearfield* decision. There we held that presentation of a government check to it for payment with an express guaranty of prior endorsements amounts to a warranty that the signature of the payee was not forged but genuine. Breach of that warranty, we said, by presenting a check on which the payee's signature is a forgery, gives the government a right to recover from the guarantor when payment is made. The checks in the instant case were presented to the government by the bank bearing forged endorsements of the payee's name, and a specific guaranty by the bank. Under the *Clearfield* rule, therefore, the government should recover, unless other principles here invoked exempt it from liability.

It is contended that had it not been for negligence of the government's administrative officers in detecting the frauds of its clerk, some, if not all, of the checks would not have been issued, and that neither the government nor the bank would have suffered any loss. The answer alleged facts which, if true, did show negligence in failing to discover the frauds, and since judgment was entered on the pleadings without trial, we must treat the

case as though negligence in this respect had been established. This question as to the effect of the drawer-drawee's negligence prior to a specific guaranty of endorsements was not directly involved in our *Clearfield* case; it was an issue in *United States* v. *National Exchange Bank*, 214 U. S. 302, a case on which we largely drew for the principles announced in the *Clearfield* decision. In the latter case, we pointed out that the *National Exchange Bank* case stood for the rule that prompt discovery of fraud was not a condition precedent to suit in cases like this. The *National Exchange Bank* case presented a situation where 194 government checks had been issued over a period of ten years as a result of forged vouchers. There as here, proper examination and supervision by government officials would have uncovered the frauds and thereby prevented or reduced the loss. The collecting bank defended there as here on the ground that the government's failure to discover the fraud should absolve the collecting bank from liability. This Court, applying the general law merchant, rejected the defense. The rule there applied, as pointed out by the court below in *Washington Loan & Trust Co.* v. *U. S.*, *supra*, has been almost unanimously accepted by State and federal courts. No persuasive reasons have been suggested to us why it should not be accepted as the general federal rule.

Rejection of the defense of the government's negligence here set up does not, as petitioner argues, conflict with this Court's holding in *United States* v. *Chase National Bank*, 252 U. S. 485. In that case the government brought suit against a bank to recover payment it made of a government draft which was itself a forgery. The name of the payee was also forged. Recovery was denied because the instrument was a forgery. The holding rested on a long established exception to the general rule under which one who presents and collects a valid commercial instrument with a forged endorsement can be compelled to repay. The reason for the exception is that a drawee is required to be familiar with a drawer's signature; if therefore the drawee pays to an innocent presenter on a forged drawer's signature, it has been held that the drawee's right to the money is not superior to that of the innocent presenter. *Price* v. *Neal*, 3 Burr. 1354. This exception is not applicable here because the signatures of the drawer on these checks were genuine while those in the Chase National Bank controversy were forged. The fact that these

checks were induced by fraud does not bring them within the reasoning of the Chase National Bank rule.

There is nothing here to support the petitioner's contention that the government's conduct in issuing the checks prompted it to guarantee the payee's endorsement. Such a guarantee no more results from the issuance of government checks than any other checks. Government regulations concerning payment of its commercial paper point the other way. Treasury Regulations have made guarantee of prior endorsements a prerequisite to payment. 31 C. F. R. 202.33. This guaranty was a protection which the government sought not only as to checks which were issued in due course for a valuable consideration, but as to checks which might have been irregularly issued. That the administrative officers failed fully to perform their duty is no reason why the government should be deprived of the advantage of a guarantee independently made by one who was not under compulsion of any kind to make it. No equitable principles require that one who, for his own reasons, guarantees a payee's signature after issuance of a check, shall be relieved of his voluntarily assumed obligation because others who owed the government obligations had previously defaulted in their obligations.

We do not say that there may not be some circumstances, not now before us, under which the government might be precluded from recovery because of conduct of a drawer prior to a guaranty of endorsement. We do hold that negligence of a drawer-drawee in failing to discover fraud prior to a guaranty of the genuineness of prior endorsements does not absolve the guarantor from liability in cases where the prior endorsements have been forged.

Affirmed.

Mr. Justice Douglas concurs in the result. Mr. Justice Murphy took no part in the consideration or decision of this case.